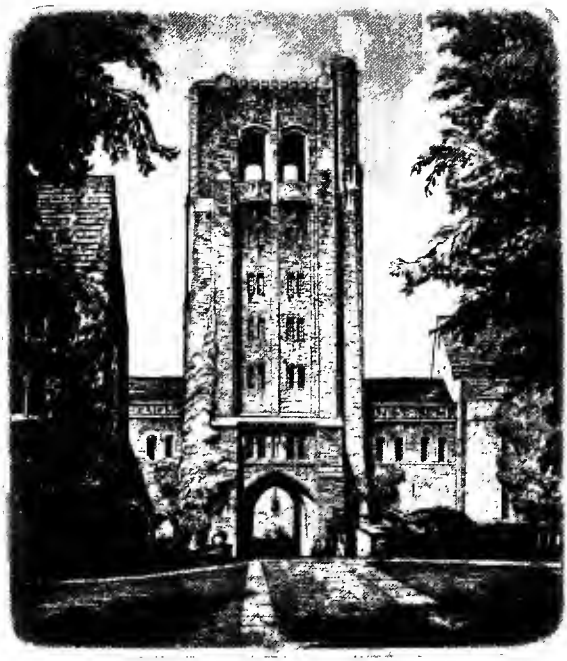
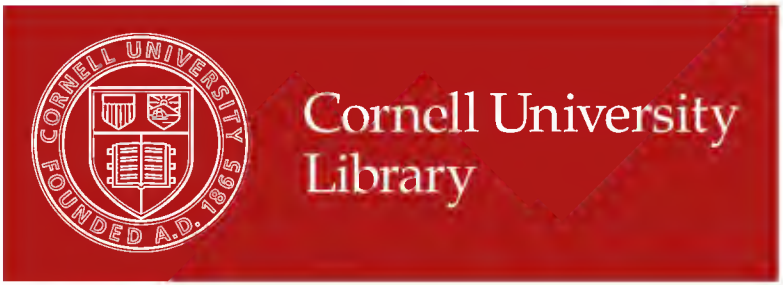
JURIES
IN
CRIMINAL CASES.

LEHMAYER.





SHOULD JURIES

IN

CRIMINAL CASES

BE

JUDGES OF THE LAW AND FACT?

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"THE fundamental definition of Trial by Jury, depends upon a universal maxim, that is without an exception. Though a definition or maxim in law, without an exception, it is said, is hardly to be found, yet this I take to be a maxim without an exception: *Ad quaestionem juris, non respondent juratores; ad quaestionem facti, non respondent judices.*" * Lord Chief Justice MANSFIELD, *in the Dean of St. Asaph's Case*, 21 *Howell's State Trials*, 1039.

"I hold it the most sacred constitutional right of every party accused of crime, that the jury should respond as to the facts, and the Court as to the law. It is the duty of the Court to instruct the jury as to the law, and it is the duty of the jury to follow the law, as it is laid down by the Court. This is the right of every citizen, and it is his only protection."—Judge STORY, in *United States* vs. *Battiste*, 2 *Sumner*, 243.

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* "It is the office of the judge to instruct the jury in points of law,—of the jury to decide on matters of fact."—*Broom's Legal Maxims*, 99.

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I.

INTRODUCTION.

THE Constitution of Maryland adopted in 1851, provided (*Art.* 10, *sec.* 5,) that "In the trial of all criminal cases the jury shall be the judges of law as well as fact." This clause, which appears in the succeeding Constitutions of 1864, (*Art.* 12, *sec.* 4,) and 1867, (*Art.* 15, *sec.* 5,) and is hence at present, part of the organic law of the State, came up for construction for the first time in our Court of Appeals, in the year 1858, in the case of *Franklin* vs. *The State*, 12 *Md.*, 236.

It was there decided, that the provision aforesaid is merely *declaratory*, and has not altered the pre-existing law regulating the relative powers of the Court and jury in criminal cases. This ruling has been recently affirmed in *Bell, alias Kimball* vs. *The State*, 57 *Md.* 108.

It is the endeavor of the following pages, with the most profound deference to our Appellate Court, to show, that this constitutional enactment is *not* declaratory of the common law, but is on the contrary directly derogatory to it, as juries in England never were the judges of the law in criminal cases; and that it is furthermore unequivocally in conflict, with the great weight and preponderance of authority in the United States.

The decision in *Franklin* vs. *The State*, arose, no doubt from the manner in which the case was presented to the Court of Appeals, The plaintiff in error had been indicted for a violation of the Act of 1858, chapter 55, entitled: "An Act to prohibit the sale of intoxicating liquors in the City of Annapolis, or within five miles thereof, to minors and people of color."

There were various questions involved, but we will only notice the one pertinent to our present inquiry. At the trial, counsel for the traverser undertook to argue before the jury, that the Act of 1858, ch. 55, was unconstitutional, but PINCKNEY, J., (special Judge,) objected, and said that the counsel could not discuss a constitutional

question before the jury, and instructed them to the effect, that although they were made by the Constitution, judges of the law and the fact in criminal cases, yet they had no right to determine a constitutional question, or whether said law was void if they believed it was unconstitutional.

Now it would seem, that if juries were to be judges of the law in criminal cases, they should have the right to pass upon the constitutionality of a statute, and in Indiana where a similar provision (*Constitution of* 1851, *Art. I, sec.* 19,) is in force, it has so been held. *Lynch* vs. *The State*, 9 *Indiana*, 541. But counsel for Franklin sued out a writ of error, and contended before the Court of Appeals, (12 *Md.* 239-240,) that prior to the adoption of the Constitution of 1851; "the Judges had the power to judge of the law, to say to the jury such is the law, and that the law made such and such offences crimes, that such and such acts came within the law, but had no power to *enforce* their instructions in case of an acquittal. The jury had power to disregard, if they chose, the instructions of the Court, and to judge of the law for themselves, and in this sense, they were said to be in criminal cases judges of the *law and fact*. *People* vs. *Croswell*, 3 *Johns. Cases*, 364 *to* 376; *State* vs. *Snow*, 18 *Maine*, 346; *Warren* vs. *The State*, 4 *Blackford*, 150."

These cases will be subsequently considered. Continuing, they argued, that "The Constitution designed to go further, and enact something more, to give to the jury some further powers, and every *voter*, when *voting* upon this Constitution, supposed he was conferring upon the jury *in all criminal cases, the exclusive judgment of the law*. There is no exception made in the clause, and the Court can make none."

The prosecution claimed, (12 *Md.* 242,) and this view was adopted by the Court, that "The constitutional provision, that 'in the trial of all criminal cases, the jury shall be the judges of law as well as fact,' is merely *declaratory* of what the common law was upon the subject, and confers upon the jury no new powers." *U. S.* vs. *Shive*, 1 *Baldwin's C. C. Reports*, 512, is cited as authority for this proposition. This case is quoted by Professor WHARTON, (3 *Wharton on Criminal Law, sec.* 3266,) by Judge CURTIS, (*United States* vs. *Morris*, 1 *Curtis*, 58–59,) and by the Supreme Court of Maine, (*State* vs. *Wright*, 53 *Maine*, 334,) to sustain the negative of the question under discussion.

The opinion of the Court of Appeals was delivered by BARTOL, J., and LE GRAND, C. J., also expressed his views. The latter said in reference to this constitutional enactment: (*Franklin* vs. *State*, 12 *Md.* 245–6;) "It was argued that the true interpretation of these words authorized the jury to judge of the constitutionality

of the Act of Assembly. In this opinion I do not concur. The debates which took place in the Convention that framed the Constitution, show what were the reasons that induced the adoption of the section. It is apparent from these debates, that *opposing views as to the powers of a jury in a criminal case prevailed in different parts of the State*, and that to guard in the future against such conflict, the provision was inserted in the Constitution. *It was well known that some members, both of the judiciary and the profession held, that juries in criminal cases were the jndges of the law as well as fact, while others held a directly contrary opinion.* It is not now important to inquire on which side there was a preponderance of authority and reason. When the meaning of the terms are fixed, there is an end to controversy in regard to the relative powers of Court and jury. So far as I know, there is no instance in which a Court admitted that the words 'judges of law as well as fact,' authorized the jury to decide on the constitutionality of a law.* With those who insisted upon the enlarged power conferred by the words in our Constitution there was no pretence that it authorized a judgment by a jury of the constitutionality of an Act of Congress or of the State Legislature. All they contended for was, that in a criminal case the jury were not bound to abide by the interpretation of the Court of the meaning of a law, but were free to construe and apply it according to their own judgments. They never pretended the jury had the right to decide on the constitutionality of an Act defining murder, arson, or any other crime, but that they had the right to affix their own meaning on the particular law, and to determine for themselves whether the facts proven brought the traverser within that meaning. The words in the Constitution have no greater significance since their incorporation into the organic law than had previously, and I think I have given to them the broadest latitude ever sanctioned or seriously countenanced by any respectable authority."

Judge BARTOL, in delivering the opinion of the Court, disposed of the question as follows: (*Franklin* vs. *The State*, 12 *Md.* 249:) "We concur also in the views expressed by the Chief Justice upon the question of the power of the jury in criminal cases to pass upon the constitutionality of the law, and think that the attempt of the counsel of the traverser to argue that question before the jury, was properly arrested by the Circuit Court. In our opinion the constitutional provision on that subject *is merely declaratory, and has not altered the pre-existing law*, regulating the powers of the Court and jury in criminal cases." This case has recently been cited and

* *Lynch* vs. *The State*, 9 *Indiana*, 541, had but recently been decided, and had consequently not yet been brought to the attention of the Court.

approved in *Bell, alias Kimball* vs. *The State,* 57 *Md.* 108, and is now the settled law of Maryland.

Mr. Wells in commenting upon this decision, says that "at first view, this looks like an evasiou by the Court;"* *Wells on Questions of Law and Fact, page* 42; and as eminent a legal writer as Mr. Bishop, seems to have entirely misunderstood the law as laid down in *Franklin* vs. *The State,* for in referring to this case, he remarks that "in Maryland, where the jury are by the express words of the Constitution, judges of law as well as fact in criminal cases, counsel are forbidden to argue the law to them, because it is said this constitutional provision only affirms the prior law, not being intended to change the relative powers of Courts and juries." 1 *Bishop on Criminal Procedure, 3rd Edition, sec.* 986. A condition of affairs, which by no means exists in this State.

It will be seen from that portion of his opinion which I have italicized, that Chief Justice LE GRAND admits that doubt existed prior to the adoption of this clause, as to whether juries in criminal cases, were judges of the law and the fact, and that this uncertainty had even extended to the Bench.

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* Mr. Wells then cites above opinion of Chief Justice LE GRAND, and remarks: "This very plainly and conclusively sets forth a restriction upon the judgment as to law of a jury in a criminal case, namely, that they cannot pronounce on the constitutionality of a law; and the decision of the Court was called for by an exception to the ruling of the Court below, in refusing to allow counsel to argue to the jury the question of constitutionality. But to me it would seem this very restriction, with others of a similar nature, determines the whole matter against the power of the jury to judge the law independently of the Court." *Wells on Questions of Law and Fact, pages* 42–44.

II.

COMMON LAW AUTHORITIES.

THE origin of trial by jury and the course of procedure thereunder, is involved in doubt. Some writers contend that the institution proceeds from Anglo-Saxon sources, while others incline to a contrary opinion. Jurymen were originally witnesses. 1 *Palgrave's Rise and Progress of the English Commonwealth*, 244. During the reign of Henry VI, trial by jury advanced to what it became in modern times, that is a trial by the jury not of matters and facts within their own knowledge, but according to the testimony of witnesses. Palgrave tells us that "trial by jury according to the old English law, was a proceeding essentially different from the modern tribunal still bearing the ancient name, by which it has been replaced," (*Ibid*, 242, 244,) and we have no less an authority than Hallam, for the statement that the result of the investigations of Reeves, Palgrave, and Starkie, has been "to sweep away from the ancient Constitution of England, what has always been accounted both the pledge of its freedom and the distinctive type of its organization—trial by jury—in the modern sense of the word, and according to modern functions." 2 *Hallam's State of Europe during the Middle Ages*, 401, *note.*

We now proceed to the main portion of our inquiry, and that is, were juries in criminal cases the judges of law as well as fact, at common law? The question can best be answered by a brief review of the decisions.

Shortly after the accession of Philip and Mary to the British throne, a case occurred in which the jurors took upon themselves to decide a point of law as to *remitter*, and after long arguments in the Court of Wards before PORTMAN and SAUNDERS, JJ., it was ordered and decreed that this was not a remitter, and the finding of the remitter was held to be invalid, because it was not for the jury to judge. 1 *Dyer*, 106*a*. This case is more fully reported in *Plowden*, and we there learn that the Court decided, that "the office of

twelve men is *no other* than to enquire of matters of fact, and *not to judge what the law is.*" 1 *Plowden*, 114*a*.

In the year 1554, Nicholas Throckmorton was tried before Lord Chief Justice DYER, for high treason. The jury found him "not guilty," for which they were imprisoned and fined. 1 *Campbell's Lives of the Chief Justices*, 183, *Life of L. C. J. Dyer*. This case is reported in the State Trials, (1 *Howell's State Trials*, 899,) where we read that the Court "being *dissatisfied* with the verdict committed the jury to prison." A rather strange course of procedure, if the jury were judges of the law.

In *Wharton's Case*, decided in 1602, during the reign of Queen Elizabeth, and reported in *Yelverton*, 23, the accused had been indicted for murder and found "not guilty," and for such verdict all the jurors were forthwith committed to prison, fined, and bound over for their good behavior.

In 1649, Col. John Lilburne was indicted for high treason, for publishing certain "scandalous, poisonous and traitorous books." 4 *Howell's State Trials*, 1380. The accused, who conducted his own defence * with great ability and ultimate success, claimed that the jury were the judges not only of the facts, but of the law also, and desired to read the law to the jury. The Court however refused to permit him to do so, and declared most emphatically that the jury had no right to pass upon the law.

In the year 1670, during the reign of Charles II, William Penn, and William Mead, were tried before the Recorder of London for sedition. That official charged the jury, that the Court was the sole judge of the question of sedition. The jury acquitted the prisoners, but were then themselves taken into custody for contempt, and fined. Edward Bushel, one of the jurors, refused to pay, and sued out a writ of *Habeas Corpus* for his release, before Chief Justice VAUGHAN. The Chief Justice delivered an exhaustive opinion, and went at considerable length into the law. He said: "the words [in the warrant] that the jury did acquit against the direction of the Court in matter of law, literally taken and *deplano*, are insignificant and not intelligible, for *no issue can be joined of matter in law*, no jury can be charged with the trial of matter in law barely, no evidence ever was or can be given to a jury of what is law or not; nor

* At that time persons accused of crime, were not permitted to be represented by counsel.

no such oath can be given to, or taken by a jury to try matter in law." *Vaughan's Reports*, 143.

"That *decantatum* in our books, *ad quaestionem facti non respondent judices, ad quaestionem legis non respondent juratores*—literally taken is true—for if it be demanded what is the fact? The Judge cannot answer it. If it be asked, what is the law in the case? The jury cannot answer it." *Vaughan's Reports*, 149. Bushel was however discharged from custody.

In the year 1678, during the reign of Charles II, Henry Hood was tried before Chief Justice KELYNGE for murder. It appeared that the victim had been killed without any provocation, and the Court directed the jury, that the crime was murder; for the law in the case intended malice, and that they were judges of the matter of fact namely, whether the party killed, died by the hand of Hood; but whether it was murder or manslaughter was a matter of law, in which they were bound to observe the direction of the Court. The jury nevertheless found Hood guilty of manslaughter only, for which they were fined and imprisoned. *Kelynge*, 50.

In 1683, during the same reign, Algernon Sidney was convicted of high treason. The instructions were to the effect that the Court was bound to declare the law to the jury, and that the latter were compelled to receive such declaration as binding, and govern their verdict accordingly. 9 *Howell's State Trials*, 889.

In 1702, during the reign of Queen Anne, Fuller was tried before Chief Justice HOLT, upon the charge of being a cheat and impostor. The question of libel seems to have been involved. The Court instructed the jury as follows: "You hear the witness say, that he (Fuller) brought the two scandalous books to the press, and that he corrected them, and he owns he was the publisher of them, and if you believe he did so, you are to find him guilty." 14 *Howell's State Trials*, 536.

This clearly leaves only the question of fact to the jury.

In 1727, during the last year of the reign of George I, John Oneby was tried for murder. The case excited great interest, (Oneby being a well known London character,) and is still regarded as a leading authority. It was referred to the Twelve Judges, certain novel questions of law having arisen during the trial. Lord RAYMOND delivered the opinion of that body, and in the course of his remarks said: "I must lay down this proposition in which they (the Judges) all agree, viz: that the Court are the judges of the malice, and not the jury; and that the Court are also judges upon the facts

found by the jury, whether if the quarrel was sudden, there was time for the passion to cool, or whether the act was deliberate or not?" 2 *Lord Raymond*, 1493, 1494.

In the year 1734, during the reign of George II, the celebrated Lord HARDWICKE, in the case of *King* vs. *Poole*, said: "The thing that governs greatly in this determination is, *that the point of law is not to be determined by juries.* Juries have a power by law to determine *matter of fact only*, and it is of the greatest consequence to the law of England, and to the subject, that these powers of the Judge and Jury are kept distinct; that the Judge determines the law, and the Jury the fact; and *if ever they come to be confounded, it will prove the confusion and destruction* of the law of England." *Lee's Cases, temp. Hardwicke, star page* 28.

It is laid down in *Coke upon Littleton*, that "the most usual trial of matters of fact is by twelve such men (jurymen); for *ad quaestionem facti, non respondent judices;* and matters in law, the Judges ought to decide and discuss, for *ad quaestionem juris, non respondent juratores*," *Coke upon Littleton, sec.* 234, 155*b*, *Hargrave's notes.*

In commenting upon this passage Mr. *Hargrave* remarks: "This *decantatum*, as Lord Chief Justice VAUGHAN calls it, on account of its frequency in the books, about the respective provinces of Judge and Jury hath since Lord COKE'S time, become the subject of very heated controversy, especially in prosecutions for State libels; some aiming to render juries wholly dependent on the Judge for matters of law, and others contending for nearly a complete and unqualified independence. * * * * * * * * * *

In respect to my own ideas on the subject, they are at present to this effect. On the one hand, as the jury may as often as they think fit, find a general verdict, I therefore think it unquestionable that they so far may decide upon the law as well as fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, * who hereafter writes that '*if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally.*' *Post. Sec.* 368, *fol.* 228. But, on the other hand, I think *it seems clear*, that questions of law generally and more properly *belong to the Judges;* and that exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations."

Mr. *Hargrave* then proceeds to give seven reasons for his opinion, but I will only cite the last one. "The Courts have long exercised

* See opinion of Judge GILCHRIST in *Pierce* vs. *The State*, 13 *N. H.* 546.

the power of granting new trials in civil cases, where the jury find against that which the Judge trying the cause, or the Court at large, holds to be law, or where the jury find a general verdict and the Court conceives that on account of difficulty of law, there ought to have been a special one. *King* vs. *Poole, Cas. temp. Hardwicke*, 26. Though too in criminal and penal cases the Judges do not claim such a discretion against persons acquitted, the reason I presume, is in respect of the rule that *nemo bis punitur aut vexatur pro eodem delicto*, or the hardship that would arise from allowing a person to be twice put in jeopardy for one offence; and if this be so, it only shows that on that account, an exception is made to a general rule. * * * * * Nor is it any small merit in this arrangement, that in consequence of it, every person accused of a crime is enabled by the general plea of *not guilty* to have the benefit of a trial, in which the Judge and jury are a check upon each other, and that this *benefit* may be always enjoyed, except in such small offences, as are left to the summary jurisdiction of a Justice of the Peace; which exception from the necessity of the times is continually increasing, but which, however, cannot be too cautiously extended to new objects. Thus considered, the distinction between the office of Judge and jury seems to claim our utmost respect. *May this wise distribution of power between the two, long continue to flourish, unspoiled either by the proud encroachment of ill-designing Judges, or the wild presumption of licentious juries.*" *Ibid.*

In the case of *Regina* vs. *Parish*, 8 *C. and P.* 94, tried in England in 1837, the traverser was under indictment for forgery. Sergeant WALESBY, who appeared for the defence, referred the Court to *Rex* vs. *Forbes*, and Lord ABINGER who presided said, that he "quite agreed" with that decision. When the case subsequently went to the jury, the counsel for the prisoner in the course of his address, was proceeding to read the observation of Mr. Justice COLERIDGE in *Forbes' Case*. But the Court, (Lord ABINGER,) interrupted him and said: "Mr. WALESBY, I cannot allow you to read cases to the jury. *It is the duty of the jury to take the law from the Judge.* It no doubt often happens that in an address to the jury, counsel cite cases; but then it is considered, that that part of the speech of the counsel is addressed to the Judge. That cannot be so here, as you very properly, in the first instance, referred me to the case, and you have my opinion upon it, you can, therefore, make no further legitimate use of the case, and the only effect of reading it would be to discuss propositions of law with the jury, *with which they have nothing to do, and which they ought to take from me.*"

III.

COMMON LAW AUTHORITIES.

THE LIBEL CASES.

THE question as to whether or not, juries in criminal cases were judges of the law, was extensively agitated in the latter portion of the stormy and eventful reign of George the Third. Chatham, the "Great Commoner" displaced from power, was gradually approaching the grave;* America was chafing under oppression; unpopular administrations had scattered the seeds of discontent far and wide; and the "rage of party ran in torrents of fire." *Junius*, that "Napoleon of political writers," had entered the lists, and with keenness and courage, that have never since been equalled, attacked the ministers, the Judges, and had the unparalleled hardihood to strike at the King himself.

His poisoned shafts of rhetoric, shot from an unseen quiver, rankled in the wounds of the victims, and the ministry was in consternation.

Then came the prosecutions for libel, which stirred the public mind to its very inmost depths, which caused the populace to flock *en masse* to the courts of justice, and express their joy at acquittals by boisterous huzzas, and which enabled Erskine, the most eloquent advocate that the English bar has ever produced, to rise to fame and fortune. The times were out of joint. Demagogues like Wilkes became the idols of the masses, and as Erskine himself has said, "libelers became popular," and "made use of the office of jury, as a stalking horse to cover iniquity."†

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* "Discontent had spread throughout the nation, and was kept up by stimulants such as had rarely been applied to the public mind. *Junius* had taken the field, had trampled Sir William Draper in the dust, had well nigh broken the heart of Blackstone, and had so mangled the reputation of the Duke of Grafton, that his Grace had become sick of office, and was beginning to look wistfully towards the shades of Euston. Every principle of foreign, domestic, and colonial policy which was dear to the heart of Chatham, had during the eclipse of his genius been violated by the government which he had formed." 3 *Macauley's Essays*, "*The Earl of Chatham*," 232.

† 4 Erskine's Speeches, 335, Address to jury, case *Plunkett* vs. *Cobbet*.

But, notwithstanding the popular outcry, the law as laid down in all these cases, and as finally declared by Justice BULLER and Lord Chief Justice MANSFIELD, in the celebrated trial of the *Dean of St. Asaph*, and as subsequently announced by the Twelve Judges, in 1792, prior to the passage of "Fox's Libel Act," *is* the common law of England. And the doctrine thus expressly laid down is, that in criminal libels, the intent is a question of law, and being a question of law, is left to the Court, exclusively and alone.

It will be necessary to go into these libel trials at some length, as they are germane to the subject.

The first reported case of this kind, that I can find is that of John Udall, in the year 1277, during the reign of Queen Elizabeth. He was charged with felony, for publishing a libel upon the sovereign. The jury were instructed, that the only matter of fact for their consideration was, whether the defendant was the author of the book, and that whether it was a libel, was a question of law for the Court alone. 1 *Howell's State Trials*, 1289.

In *Tuchin's Case*, (A. D. 1704, in the third year of the reign of Queen Anne,) where the traverser had been indicted for libel, Lord Chief Justice HOLT, in concluding his charge to the jury, said: "Gentlemen, I must leave it to you; if you are satisfied that he is guilty of composing and publishing these papers in London, you are to find him guilty." 14 *Howell's State Trials*, 1129. This case has been cited as an authority in favor of the affirmative of the question under consideration.* Erskine, in support of a motion for a new trial, in the case of *The King* vs. *The Dean of St. Asaph*, quotes a portion of the decision, but omits this important and qualifying conclusion. 21 *Howell's State Trials*, 1015–1017.

In 1770, John Almon, a bookseller, was tried upon a charge of criminal libel for selling *Junius'* "Letter to the King." Lord MANSFIELD instructed the jury, that there were two grounds for their consideration. First, of publication, and second, whether the construction put upon the publication by the prosecution, in inserting words where there were dashes and not words at length, was the true construction. 20 *Howell's State Trials*, 836. Almon was found guilty.

John Miller was tried in the same year, for reprinting this letter. Lord MANSFIELD again presided and charged the jury as in the pre-

*KENT, J., in case of *People* vs. *Croswell*, 3 *Johns. Cases*, 371.

ceding case. He further said: "If the law was to be determined (by the jury) in every particular cause, what miserable condition would this country be in, with regard to that part of it, as it is said there cannot be a greater curse than uncertainty in the law, for one jury in Middlesex find one way, and a jury in London another way. * * * * * If juries were to find according *to the different impressions the different points of law have upon them, there might be no law at all upon the subject.*" 20 *Howell's State Trials*, 895. Miller was however acquitted.

Then came the case of Henry S. Woodfall, indicted for publishing *Junius'* "Letter to the King." The bias of the report in the State Trials, and its hostility to Lord MANSFIELD, the presiding Judge, are plainly apparent. So much so, that the editor feels called upon to say by way of apology, that said report being the fullest account of this trial which he has seen, he inserted it "notwithstanding the flippancy and partiality of its manner." Evidently not satisfied with this explanation, he adds the synopsis of the Court's instructions to the jury, as given in the preface to Mr. G. Woodfall's Edition of *Junius*, and from this we learn, that the charge was in all respects similar to Lord MANSFIELD'S previous instructions in cases of this kind. 20 *Howell's State Trials*, 900.

Woodfall was found guilty of "printing and publishing only," and a *venire de novo* was granted.

In 1777, John Horne was tried in the Court of King's Bench for libel. He had published a pamphlet reflecting rather strongly upon the British Government, and the employment of the English troops at the Battle of Lexington. The alleged libel recited among other things, that at a meeting of several members of the "Constitutional Society," a subscription had been raised "to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who faithful to the character of Englishmen, preferring death to slavery, were for that reason only, inhumanly murdered by the King's troops at or near Lexington and Concord, in the Province of Massachusetts." Lord MANSFIELD in charging the jury made use of the following language:

"Gentlemen of the jury, if ever there was a question, the true merits of which lay in a very narrow compass, it is the present. This is an information against the defendant for writing, and composing, and printing and publishing, or causing to be printed and published, that is, for being the author and publisher of a paper, which the information charges as a seditious libel. If it be a seditious libel in its own nature, there is no justification attempted; why then, there are

but two points for you to satisfy yourselves in, in order to the forming of your verdict. *Did he compose and publish, that is, was he the author and publisher of it?* Upon this occasion, that is entirely out of the case, for it is admitted. * * * * * * * * *Is the sense of this paper,* that arraignment of the Government, and the employment of the troops upon the occasion of Lexington mentioned in that paper?*† * * * * You will judge whether it (the pamphlet) conveys a harmless, innocent proposition for the good and welfare of this kingdom, the support of the legislative government, and the King's authority according to law; or whether it is not denying the government and legislative authority of England, and justifying the Americans; averring that they are totally innocent; that they only desire not to be slaves, not disputing to be subjects, but they desire only not to be slaves; and that the use that is made of the King's troops upon this occasion, (for you will carry your mind back to the time when this paper was *wrote*,) was to reduce them to slavery. And if it was intended to convey that meaning, there can be little doubt whether that is an arraignment of the government, and of the troops employed by them, or not." 20 *Howell's State Trials*, 759–762.

We now come to consider the famous case of the *King* vs. *The Dean of St. Asaph*, which as Lord CAMPBELL has said, "seemed to establish forever the fatal doctrine that libel or no libel, was a pure question of law for the exclusive determination of Judges appointed by the Crown."‡ I do not desire to be understood as defending this doctrine, but I contend that BULLER, J. and MANSFIELD, C. J., who were concerned in this trial, expounded the common law as they found it, according to practice and precedent. As this decision is of the highest importance in its bearing upon the question under consideration, it will not be out of place to say a word, in reference to the two Judges engaged in this trial.

Mr. Justice BULLER was one of England's eminent Judges; elevated to the Bench at the unprecedented early age of thirty-two, his talents were great and his integrity unquestioned, and of him it has been said, that "as Burke's name in the Senate, is the name of Buller in Westminster Hall."§

Lord Chief Justice MANSFIELD, was without doubt, pre-eminently the greatest Judge that ever sat upon the English Bench. He gave his country her commercial code, and " has done more for the juris-

* The Pamphlet.

† The Indictment.

‡ 6 Campbell's Lives of the Lord Chancellors, 346.

§ 1 Townsend's Twelve Eminent Judges, 1.

prudence of England than any legislator or Judge, or author, who has ever made the improvement of it, his object." *Welsby*, 448.

One of his successors, (Lord CAMPBELL,) speaks of him as follows:*

"There are a few undeniable facts, which are quite conclusive to prove that he enjoyed an unparalleled ascendancy, and that this ascendancy was well deserved. Although he presided above thirty years in the Court of King's Bench, there were in all that time, only two cases in which his opinion was not unanimously adopted by his brethren, who sat on the bench with him, yet they were men of deep learning and entire independence of mind. * * * * Again, of the many thousand judgments, which Lord MANSFIELD pronounced during the third part of a century, two only were reversed. * * * * What will appear to my professional brethren a more striking fact still, strongly evincing the confidence reposed in his judicial candor and ability, by such men as Dunning and Erskine, opposed to him in politics, who practised before him, in all this time there never was a bill of exceptions tendered to his direction; the counsel against whom he decided, either acquiescing in his ruling or being perfectly satisfied that the question would afterwards be fairly brought before the Court, and satisfactorily determined on a motion for a new trial. I must likewise, observe that the whole community of England, from their first experience of him, on the bench, with the exception of occasional displays of party hostility, concurred in doing homage to his extraordinary merits as a Judge. Crowds eagerly attended to listen to him, when he was expected to pronounce judgment in a case of importance. To gratify public curiosity, the unknown practice began of reporting in the newspapers his address to juries, and all suitors sanguine in their belief of being entitled to succeed, brought their cases to be tried before him, so that the business of the King's Bench increased amazingly, while that of the other Courts of common law, dwindled away almost to nothing. * * * * *

In his own life-time, and after he had only a few years worn his ermine, he acquired the designation by which he was afterwards known, and by which he will be called when five hundred years hence, his tomb is shown in Westminster Abbey—that of 'THE GREAT LORD MANSFIELD.'"

The distinguished American jurist, Judge STORY, eulogizes the Chief Justice as follows: "England and America, and the civilized world, lie under the deepest obligations to him. Wherever commerce shall extend its social influence; wherever justice shall be

* 2 Campbell's Lives of the Chief Justices, 395–7.

administered by enlightened and liberal rules; wherever contracts shall be expounded upon the eternal principles of right and wrong; wherever moral delicacy and judicial refinement shall be infused into the municipal code, at once to persuade men to be honest, and to keep them so; wherever the intercourse of mankind shall aim at something more elevated than that grovelling spirit of barter, in which meanness, and avarice, and fraud, strive for the mastery over ignorance, credulity, and folly, the name of Lord MANSFIELD will be held in reverence by the good and the wise, by the honest merchant, the enlightened lawyer, the just statesman, and the conscientious judge." *Story's Miscellaneous Works*, 412.

Lord MANSFIELD repeatedly declined the Great Seal, preferring his humbler position, and his decisions are cited as authorities of the highest rank, on both sides of the Atlantic. Many of his judgments were bitterly attacked by *Junius*, but the latter was no lawyer as his letters indicate, 2 *Woodfall's Junius*, *Introduction*, *XIV*, and as he himself has acknowledged. *Ibid*, 91, *Letter to Wilkes*. It goes without saying that MANSFIELD, whose opinions on all other subjects are universally accepted as the law, has in these libel cases, and more especially in the *Dean of St. Asaph's Case*, where the previous decisions were reviewed and confirmed, correctly laid down the law.

Junius, in the most classical English, fiercely attacked the great Judge in a letter which appeared in the *Morning Advertiser*.* After saying that "Our language has no term of reproach, the mind has no idea of detestation, which has not already been happily applied to you and exhausted. Ampler justice has been done by abler pens than mine, to the separate merits of your life and character. Let it be my humble office to collect the scattered sweets, till their united virtue tortures the sense," he enters into a general attack upon him. Beginning by paying a tribute to his "Scotch sincerity," he charges his Lordship with having drank the Pretender's health upon his knees; † accuses him of reviving the maxims of government of his "favorite family," the house of Stuart; insinuates that he has always endeavored to enlarge the power of the Crown at the subject's expense, by attacking the liberty of the press; accuses him of laboring to contract the power of the jury, or to mislead their judgment; and charges that instead of positive

* Dated Nov, 14, 1770. In the envelope to this address, *Junius* confidentially informed the printer, that "the enclosed, though begun within these few days, has been greatly laboured." 1 *Woodfall's Junius*, 305, *note*.

† In 1753, this charge had been investigated before the Privy Council and the House of Lords, but both tribunals acquitted MANSFIELD, (then Mr. MURRAY,) and declared the accusation to be a foul calumny. 1 *Woodfall's Junius*, 307, *note*.

rules which should determine a Court, he has introduced his "own unsettled notions" of equity; and after various other accusations, equally groundless, and of more or less enormity, states in conclusion, that "no learned man even among your own *tribe*, thinks you qualified to preside in a Court of common law; yet it is confessed, that under Justinian you might have made an incomparable Praetor." The scurrility of the letter is apparent.

Referring to the Chief Justice, BROUGHAM makes use of the following language: "Lord MANSFIELD, whose luminous mind was never misunderstood, except by those who were either jealous of his fame or ignorant of his value in the science of jurisprudence,—whom no man ever attacked for a deficiency in his knowledge of the laws, (with the exception of *one great writer*, [*Junius*] whose style gave currency for a time, to the assertion, though accompanied by an obvious want of legal knowledge in himself,) that great man had noticed many of the discrepancies of the law, with the eye of a philosopher, which were not to be changed by the habits of the practitioner."*

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* Speech on the State of the Law, Feb. 8, 1828, cited in 1 *Woodfall's Junius*, 437.

NOTE.—Numerous anonymous writers took up the gauntlet in defence of the maligned Chief Justice. *Zeno* vehemently came to his aid in a letter addressed to *Junius*, and printed in the *Public Advertiser*, as follows: "It is also a lie, that Lord MANSFIELD attacks the liberty of the press. He has endeavored, indeed by legal and constitutional methods, to restrain the abuse of that liberty, and, in doing so, he has shown himself a good citizen. Are you a politician, and ignorant that the abuse of the best things makes them degenerate into the worst? Are you a pretender to reason, and ignorant that the abuse of a valuable privilege is the certain means to lose it? Are you not a public defamer of every respectable character in the nation? Have you not carried the license of the press beyond the bounds not only of decency and humanity, but even of human conception? And dare you complain that its liberty is attacked?

Your reliance on the ignorance of those to whom you write must be great indeed, when you dare affirm a fact, which is contradicted and proved a lie by the very affirmation of its truth. * * * * * * By whose advice was it that His Majesty, immediately on his accession to the throne, made the Judges places for life, thereby rendering them independent *on* King or minister? Lord MANSFIELD. When Lord CHATHAM and Lord CAMDEN attempted to revive the impious and unconstitutional doctrine of a power in the Crown to dispense with the laws of the land, (which was precisely the point on which the glorious revolution hinged, and the doctrine for maintaining of which, James II lost his crown,) who stood in the breach, and with eloquence and argument, more than human, defeated the pernicious attempt? Lord MANSFIELD. Who supported and carried through the House of Peers, the bill called the *Nullum Tempus* bill; that law by which the minds of the people were quieted against apprehension of claims on the part of the Crown? Lord MANSFIELD. To whom do we owe the success of the bill for restraining the privilege of Parliament, of such essential service to the internal commerce of the nation, and especially to that part of it, which could least afford to lie under any disadvantage, the industrious shopkeeper and trades

We now reach in chronological order, the case of *The King* vs. *The Dean of St. Asaph.* 21 *Howell's State Trials*, 847–1046.

Reverend William Davis Shipley, Dean of St. Asaph, was indicted in 1783, (the twenty-third year of the reign of George III,) for publishing a seditious libel. He was defended by Erskine. When the case was first called for trial at Wrexham, the prosecution asked for a postponement on the ground that a pamphlet had just been circulated about the place, which tended to prejudice the trial. Notwithstanding Erskine's eloquent protest, and an earnest appeal from the Dean himself for an immediate hearing, Lord KENYON (BARRINGTON, J., concurring,) granted a continuance. At the spring assizes in the following year, Erskine travelled clear across the Island to try the case. Just as he was alighting from his chaise at Wrexham, a writ of *certiorari* was presented to the Court, commanding the case to be sent to the Court of King's Bench,* where it finally came up in August, 1784.

The fact of publication was not disputed. Erskine in a most powerful and impassioned speech, contended that the question of libel, *vel non*, was a matter for the jury to consider; in other words, that they could decide and pass upon the law. Mr. Justice BULLER, who presided at the trial, instructed the jury as follows:† "You have heard a great deal said which really does not belong to the case, and a part of it has embarrassed me a good deal in what manner to treat it. I cannot subscribe to a good deal I have heard from the defendant's counsel, but I do readily admit the truth and wisdom of that proposition stated from Locke, that wherever the law ends, tyranny begins.

The question then is, what is the law as applicable to this business? And to narrow it still more, what is the law in this stage of the business? You have been pressed very much by the counsel, and so have I also, to give an opinion upon the question, whether this pamphlet is, or is not a libel. Gentlemen, it is my happiness that I find the law *so well and so fully settled*, that it is impossible for any man, who means well, to doubt about it. * * *

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man? Lord MANSFIELD 1 *Woodfall's Junius*, 422–5, *note.* A "Barrister-at-Law" also replied in the following strain: "*His Lordship has destroyed the liberty of the press. Junius*, in this charge, gives himself the lie. No writer ever used the liberty of the press with such unrestrained freedom as himself; no times were ever so much marked as the present with public scurrility and defamation. A reply to the charge is in *every* column of *every* paper. They are the most dangerous enemies who abuse the liberty of the press, like *Junius* and his adherents." 1 *Woodfall's Junius*, 433, *note.*

*See Erskine's address, 21 *Howell's State Trials*, 904–905.

†*Ibid*, 944–950.

You have been addressed by the quotation of a great many cases upon libels. It seems to me, that this question is so well settled, that gentlemen should not agitate it again; or at least when they do agitate it, it should be done by stating fairly and fully, what has passed on all sides, not by stating a passage or two from a particular case, that may be twisted to the purpose, that they want it to answer, and how this doctrine ever comes to be now seriously contended for, is a matter of some astonishment to me, for *I do not know any one question in the law which is more thoroughly established than this is.** I know it is not the language of a particular set, or party of men, because the very last case that has ever arisen upon a libel was conducted by a very respectable and a very honorable man, who is as warm a partisan, and upon the same side of the question as the counsel for the defendant, and I believe, of what is called the same party. But he stated the case in a few words, which I certainly adopted afterwards, and of which I believe no man ever doubted about the propriety. That case arose not three weeks ago, at Guildhall upon a question of a libel, and in stating the plaintiff's case, he, (Mr. John Lee, then the Attorney-General,) told the jury that there could be but three questions. The first is: whether the defendant is guilty of publishing the libel, the second, whether the innuendoes, or the averments made on the record are true? The third, which is *a question of law*, whether it is a libel or not? Therefore, said he, the two first are the only questions you have to consider; and this, he added very rightly is clear and undoubted law. It was adopted by me, as clear and undoubted law, and has been so held for considerable more than a century past."

Referring to Lord MANSFIELD, he said: "For 28 years past, (during which time we have had a vast number of prosecutions in different shapes for libels,) the uniform and invariable conduct of the noble Judge has been, to state the questions as I have just stated them to you, and though the cases have been defended by counsel not likely to yield much, yet that point was never found fault with by them, and often as it has been enforced by the Court, they never have attempted yet by any application to set it aside. * * * * They (defendant's counsel,) have addressed you, not as is very usual to address a jury, which you must know yourselves, if you have often served upon them, they have addressed you upon a question of law, on

* Erskine had been Judge BULLER'S pupil; at the beginning of his address to the jury on this occasion, the former said: "I cannot help congratulating the public, that you are to try this indictment, with the assistance of the learned Judge before you, much too instructed in the laws of this land to mislead you by mistake and too conscientious to misinstruct you by design." 21 *Howell's State Trials*,—*Dean of St. Asaph's Case*, 900.

which they have quoted cases for a century back. Now are you possessed of those cases in your own minds,—are you apprised of the distinctions on which these determinations are founded? Is it not a little extraordinary to require of a jury that they should carry all the legal determinations in their minds? If one looks a little farther into the Constitution, it seems to me, that without recourse to authorities it cannot admit of a doubt, what is the mode of administering justice in this country. *The Judges are appointed to decide the law, the jury to decide the fact.* * * * * If the fact were, that the defendant never denied the publication, but meant to admit it, and insist that it was not a libel, he had another way in which he should have done it, a way universally known to the profession, he ought to have demurred to the indictment, by which in substance he would have said, I admit the fact of publishing it, but deny that it is any offence. But he is not precluded even now from saying it is not a libel, for if the fact be found by you that he did publish the pamphlet, and upon future consideration the Court of King's Bench shall be of opinion that it is not a libel, he must be acquitted. As to his coming here, it is his own choice."

He then explains the innuendoes to the jury. "The innuendoes are no more than this, the indictment says that by the letter 'G' is meant 'Gentleman,' and by the letter 'F' is meant 'Farmer.' Now the title of this pamphlet is, 'The Principles of Government, in a Dialogue between a Gentleman and a Farmer.' The first question is, whether the 'G' means gentleman, and the 'F,' farmer; the next question is not upon initials or letters that may be doubtful, but whether 'the '*King*,' written at length, means the *King of Great Britain*, and whether '*the Parliament*,' means the *Parliament of Great Britain*,—these are points I don't know how to state a question upon; and if you are satisfied as to the innuendoes, the only remaining question of fact is as to the publication."

The charge concluded as follows "I can only say, that if you are satisfied that the defendant did publish this pamphlet, and are satisfied as to the truth of the innuendoes, in point of law you ought to find him guilty; if you are not satisfied of that, you will of course acquit him." The jury withdrew, and in half an hour returned with the announcement, that they had found the accused "guilty of publishing only."

After quite an animated discussion between the Court and Mr Erskine, as to how the verdict should be entered up, it was recorded as a general verdict of guilty.

On November 8th of the same year, Erskine moved the Court to set aside this verdict, for misdirection of the Judge in his charge to

the jury; delivered an elaborate argument in support of the motion; and obtained a rule to show cause why there should not be a new trial. 21 *Howell's State Trials*, 971–1032. In the following week, cause was shown by the prosecution, and the Court *unanimously* discharged the rule and denied a new trial. Lord Chief Justice MANSFIELD delivered the opinion. He said: *Ibid*, 1033–1040.

"In this case of the King against Mr. Shipley, Dean of St. Asaph, the motion to set aside the verdict, and to grant a new trial upon account of the misdirection of the Judge, supposes that upon this verdict (either as a general, or as minutes of a special verdict to be reduced into form,) judgment may be given; for if the verdict was defective and omitted finding anything within the province of the jury to find, there ought to be a *venire de novo*, and consequently this motion is totally improper; therefore as I said, the motion supposes that judgment may be given upon the verdict, and it rests upon the objections to the directions of the Judge. I think they may be reduced to four in number, one of which is peculiar to this case and therefore I begin with it, viz: That the Judge did not leave the evidence of a lawful excuse or justification to the jury, as a ground for them to acquit the defendant upon, or as a matter for their consideration."

His Lordship then proceeds to overrule this first objection, and lays down the law as follows: "Upon every such defence set up of a lawful excuse or justification, there necessarily arise two questions, one of law, the other of fact; the first to be decided by the Court, the second by the jury. * * * * * * * * * * * * * * * * * * The second objection, is that the Judge did not give his own opinion whether the writing was a libel, or seditious or criminal. The third, that the Judge told the jury they ought to leave that question upon record to the Court, if they had no doubt of the meaning and publication. The fourth and last, that he did not leave the defendant's intent to the jury.

The answer to these three objections is, that by the Constitution the jury ought not to decide the question of law, whether such a writing of such a meaning, published without lawful excuse, be criminal, and they cannot decide it *finally* against the defendant, because after the verdict it remains open upon the record. Therefore it is the duty of the Judge to advise the jury, to separate the question of fact from question of law, *as they ought not to decide the law*, and the question remains entire upon the record; the Judge is not called upon necessarily to tell them his own opinion.

It is almost peculiar to the form of the prosecution for a libel, that the question of law remains entirely for the Court *upon record*, and that the jury cannot decide it against the defendant, so that a gene-

ral verdict that the defendant is guilty, is equivalent to a special verdict in other cases. It finds all which belongs to the jury to find; it finds nothing as to the question of law. * * * * The subject-matter of the three [last] objections, [the first being peculiar to the case under consideration,] has arisen upon every trial for a libel since the Revolution, which is now near 100 years ago. In every reign there have been many such trials, both of a private and a public nature. In every reign, there have been several defended with all the acrimony of party animosity, and a spirit ready to contest every point and admit nothing. During all this time, as far as can be traced, one may venture to say, that the *direction of every Judge has been consonant to the doctrine of Mr. Justice* BULLER, and no counsel has complained of it by an application to the Court. * * * * During the reign of Queen Anne, we know several trials were had for libels, but the only one cited is in the year 1704; and there the direction (though Lord HOLT, who is said to have done it in several cases, goes into the enormity of the libel) to the jury was: 'If you find the *publication* in London, you must find the defendant guilty.' Thus it stands as to all that can be found precisely and particularly, in the reigns of King William and Queen Anne. We know that in the reign of George I, there were several trials for libels, but I have seen no note or traces of them, nor any question concerning them. In the reign of George II, there were others, but the first of which there is a note (for which I am obliged to Mr. Manly) * was in February, 1729—the King and Clarke, which was tried before C. J. Lord RAYMOND, there he lays it down expressly, (there being no question about an excuse, or about the meaning,) he lays it down, the *fact of printing and publishing only is in issue.*

The *Craftsman* was a celebrated party paper, written in opposition to the ministry of Sir Robert Walpole, by many men of high rank and great talents, the whole party espoused it. It was thought proper to prosecute the famous Hague letter. I was present at the trial, it was in the year 1731. It happened to be printed in the State Trials. There was a great concourse of people, it was a matter of great expectation, and many persons of high rank were present to countenance the defendant. Mr. Fazakerly and Mr. Bootle, (afterwards Sir Thomas Bootle,) were the leading counsel for the defendant. They started every objection and labored every point. When the Judge overruled them, he usually said, 'If I am wrong, you know where to apply.' The Judge was my Lord RAYMOND, C. J., who had been eminent at the bar, in the reign of Queen Anne, had been Solicitor and Attorney-General in the reign of George I, and was intimately connected

* One of the Counsel for the Crown on that occasion.

with Sir Edward Northy, so that he must have known what the ancient practice had been.

The case itself was of great expectation, as I have stated to you, and it was so blended with party passion, that it required his utmost attention; yet, when he came to sum up and direct the jury, he does it, as of course, just in the same manner as Mr. Justice BULLER did: that there were three points for consideration, the fact of publication, the meaning (those two for the jury,) the *question of law* or criminality for the Court upon the record." Lord MANSFIELD then cites, "from memory only," a ballad composed by Mr. Pulteney, when the *Craftsman* was acquitted:

"'For Sir Philip * well knows,
That his innuendoes
Will serve him no longer
In verse or in prose;
For twelve honest men, have decided the cause,
Who are Judges of fact, though not Judges of laws.'" †

* * * * "There are no notes of the trials for libels before my Lord HARDWICKE. I am sure there are none before Lord C. J. LEE till the year 1752, when the case of *King and Owen* came on before him. This happens to be printed in the State Trials, though it is incorrect, but sufficient for the present purpose. I attended that trial as Solicitor-General. Lord C. Justice LEE was the most scrupulous observer and follower of precedents, and he directed the jury *as of course*, in the same way as Mr. Justice BULLER has done.

When I was Attorney-General, I prosecuted some libels, one I remember from the condition and circumstances of the defendant; he was found guilty. He was a common councilman of the City of London, and I remember another circumstance, it was the first conviction in the City of London, that had been for 27 years. It was the case of the *King and Nutt;* and there he was convicted, under the very same direction before Lord Chief Justice RYDER.

In the year 1756, I came into the office I now hold. Upon the first prosecution for a libel, which stood in my paper I think, (but I am

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* Sir Philip York, afterwards Lord Chancellor HARDWICKE, who as Attorney-General, conducted the prosecution.

† Lord CAMPBELL states that the Chief Justice is in error as to this quotation, and that the stanza concluded as follows:

"For twelve honest men have determined the cause,
Who are Judges alike of the facts, and the laws."

See *Lives of the Lord Chancellors, Life of Erskine; Lives of the Chief Justices, Life of Mansfield.*

not sure,) but I think, it was the case of the *King and Shebbeare*, I made up my mind as to the direction I ought to give. I have uniformly given the same in all, almost in the same form of words."

His Lordship then proceeds to state, that his instructions in these cases have always been in accordance with the directions of Justice BULLER, above referred to.

Continuing he says: "Such a judicial practice in the precise point from the Revolution, as I think, down to the present day, is not to be shaken by arguments of general theory or popular declamation. * * * * The fundamental definition of trial by jury depends upon a *universal maxim that is without an exception.* Though a definition or maxim in law, without an exception, it is said, is hardly to be found, yet this I take to be *a maxim without an exception*: AD QUÆSTIONEM JURIS, NON RESPONDENT JURATORES; AD QUÆSTIONEM FACTI, NON RESPONDENT JUDICES.

* * * * The Constitution trusts that under the direction of a Judge, they (the jury) will not usurp a jurisdiction which is not in their province. *They do not know, and are not presumed to know the law;* they are not sworn to decide the law; they are not required to decide the law.

If it appears upon the record, they ought to leave it there, or they may find the facts, subject to the opinion of the Court upon the law. But further upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of the law. * * * * It is the duty of the Judge, in all cases of general justice to tell the jury how to do right, though they have it in *their power* to do wrong, which is a matter entirely between God and their own consciences." The opinion concludes as follows:

"Agreeable to the *uniform* judicial practice since the Revolution, warranted by the fundamental principles of the Constitution, of the trial by jury, and upon the reason and fitness of the thing, we are all of opinion, that this motion should be rejected, and the rule discharged."

Mr. Erskine subsequently moved the Court to arrest the judgment upon the two following grounds: *First:* Because even if the indictment sufficiently charged a libel, the verdict given by the jury was not sufficient to warrant the judgment of the Court; and *secondly*, because the indictment did not contain any sufficient charge of libel.

The Court being of the opinion that the indictment was defective, arrested the judgment. 21 *Howell's State Trials*, 1044–1045.

These extracts have been inserted at length, because I deem them conclusive, coming as they do from the very highest authority. This trial and the preceding prosecutions for libel, caused great

popular clamor, but there is no doubt that the Chief Justice was correct, and his decision was subsequently declared to be the law by the Twelve Judges of England.

In 1791, the following Act was offered in the House of Commons, by Mr. Fox:

"An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel."

"I. Whereas Doubts have arisen whether on the trial of an Indictment or Information for the making or publishing any libel, where an issue or issues are joined between the King and the Defendant or Defendants, on the Plea of not guilty pleaded, it be competent to the Jury impanelled to try the same, to give their verdict upon the whole matter in issue: Be it therefore declared and enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, That on every such Trial, the Jury sworn to try the Issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such Indictment or Information; and shall not be required or directed by the Court or Judge before whom such Indictment or Information shall be tried, to find the Defendant or Defendants guilty, merely on the Proof of the Publication by such Defendant or Defendants, of the Paper charged to be a Libel, and of the Sense ascribed to the same in such Indictment or Information.

II. Provided always, That on every such Trial, the Court or Judge before whom such Indictment or Information shall be tried, shall according to their or his Discretion, give their or his Opinion and Directions to the Jury on the matter in Issue between the King and the Defendant or Defendants, in like manner as in other criminal cases.

III. Provided also, that nothing herein contained shall extend to or be construed to extend, to prevent the Jury from finding a special verdict in their Discretion, as in other criminal cases.

IV. Provided also, That in case the Jury shall find the Defendant or Defendants guilty, it shall and may be lawful for the said Defendant or Defendants to move in arrest of Judgment on such ground and in such manner as by Law, he or they might have done before the passing of this Act, anything herein contained to the contrary notwithstanding."

It passed in the Commons, but was rejected in the Upper House, on account of the opposition of Lords KENYON, THURLOW, and BATHURST. In the following year, however, owing to the unwearied efforts of Lord CAMDEN, the bill passed in the House of Lords,

and was incorporated into the Statute Book as 32 *George III, c.* 60; it is familiarly known as "Fox's Libel Act," and became a law under the following circumstances: On February 14th, 1792, a message was brought to the Lords from the House of Commons, by Mr. Fox and others, with above bill, to which they desired the concurrence of the Upper House. The matter was referred to the Twelve Judges, and their unanimous opinion was delivered by Lord Chief Baron EYRE, and supported in every particular, the law as laid down by BULLER and MANSFIELD in the *Dean of St. Asaph's Case.* The following members of the House of Lords protested against the passage of the Act: THURLOW, Chancellor; KENYON, Chief Justice; WALSINGHAM, BATHURST, ABINGDON, and JOHN BANGOR. They dissented and filed, under their signatures the following objections, which were inserted in the Journal. 22 *Howell's State Trials*, 306.

1st. "Because the rule laid down by the bill, contrary to the unanimous opinion of the Judges, and the unvaried practice of ages, subverts a fundamental and important principle of English jurisprudence, which leaving to the jury the trial of the fact, reserves to the Court the decision of the law. It was truly said by Lord HARDWICKE in the Court of King's Bench, that if these come to be confounded, it will prove the confusion and destruction of the law of England.

2ud. Because juries can in no case decide whether the matter of record be sufficient upon which to found a judgment. The bill admits the criminality of the writing set forth in the indictment or information to be matter of law, whereupon judgment may be arrested, notwithstanding the jury have found the defendant guilty. This shows that the question is upon the record, and distinctly separated from the province of the jury, which is only to try facts.

3rd. Because by confining the rule to an indictment or information for a libel, it is admitted that it does not apply to the trial of the general issue, in an action for the same libel, or any sort of action, or any other sort of indictment or information; but as the same principle and the same rule must apply to all general issues or to none, the rule as declared by the bill is manifestly erroneous." This protest, signed as it is, by the Lord Chief Justice* and two Lord Chancellors of England,† is a most significant endorsement of Lord MANSFIELD'S doctrine.

Erskine, who had commenced his brilliant career, by plunging into "the sedition" line, denounced the decision made in the *Dean of St. Asaph's Case.* He says, in referring thereto: "I moved the Court of

*Kenyon.

†Thurlow and Bathurst.

King's Bench for a new trial, for a misdirection of the Judge, and misconduct after the verdict was returned into Court. I made the motion from no hope of success, but from a fixed resolution to expose to public contempt, the doctrines fastened on the public as law by Lord Chief Justice MANSFIELD, and to excite if possible, the attention of Parliament, to so great an object of national freedom." 1 *Erskine's Speeches*, 387, *note*. Six years later, in the case of the *King* vs. *Withers*, 3 *Term Rep.* 428, the accused was indicted for publishing a libel upon Mrs. Fitzherbert, the mistress of George IV.; KENYON, C. J., instructed the jury, that there were two questions for their consideration; first, whether the defendant was guilty of publishing the pamphlet, and secondly, whether the innuendoes were true.

Withers was found guilty. These instructions are in conformity with the law as laid down in the *Dean of St. Asaph's Case*. Erskine then appeared, not to move for a new trial, or in arrest of judgment, but *on behalf of the prosecution, and in order to aggravate the punishment*, produced to the Court, an affidavit to which was annexed another pamphlet written by the defendant *after* the trial, and which he (Withers) called an apology, but which Mr. Erskine claimed was more libellous than the publication for which he had been tried. His benevolent request was granted and the additional punishment imposed. *

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* The effect and result of Fox's Libel Act has been, that "a man may publish anything which twelve of his countrymen think is not blamable, but he ought to be punished if he publishes that which is blamable."—Lord KENYON in *Rex* vs. *Cuthell*, 27 *Howell's State Trials*, 675.

"Mr. Fox's Act only requires the Judges to give their opinion on matters of law in libel cases as in other cases. But did any Judge ever say, 'Gentlemen, I am of opinion that this is a wilful, malicious, and atrocious murder.' For a considerable time after the Act passed, against the unanimous opposition of the Judges, they almost all spitefully followed this course. I myself heard one Judge say: 'As the Legislature requires me to give my own opinion in the present case, I am of opinion that this is a diabolically, atrocious libel.'—Lord DENMAN now puts the just construction on the Act, by leaving the question to the jury and telling them, that if so and so, be the tendency and intention of the paper, it is a libel *aliter non*." 6 *Campbell's Lives of the Lord Chancellors*, *Life of Erskine*, 401, *note*.

In charging a jury in 1817, upon the trial of Hone for libel, Lord ELLENBOROUGH said: "There were many things in the parodies which had been read which must be considered profane, and impious; [the accused had read parodies in prose and verse from Swift to Canning,] but this of the defendant transcended them all in magnitude. He would deliver to them his solemn opinion, as he was required, by Act of Parliament to do, and under the authority of that Act, and still more in obedience to his conscience and his God, he pronounced this to be a most impious and profane libel. Believing that they [the jury] were Christians he had not any doubt, but that they would be of the same opinion." 1 *Townsend's Lives of Twelve Eminent Judges*, 388–389.

The provision that "in all criminal cases, the jury shall be Judges of the law and the fact" * was adopted by the Constitutional Convention of 1851, under the following circumstances: †

Mr. SPENCER, who proposed this article said, that he "had understood that there had recently been a decision, that the jury were bound by the opinion of the Judge, in matter of law. He was in favor of the pending amendment, and wished this provision to accompany it."

Mr. BRENT, of Baltimore City, said, that he "had offered just such an amendment, and it had been voted down. There had been such a decision within the last twelve days, as had been stated by the gentleman from Queen Anne's, [Mr. SPENCER,] and it was a matter of doubt in many districts. In a civil case there could be a bill of exceptions, but in a criminal case there was only a writ of error. It seemed better that the principle should be adopted in Maryland, which had been brought about in England by the eloquence of Erskine and other eminent jurists, that the jury should be judges in the last resort, both of law and fact."

Mr. BRENT was evidently mistaken; the legislation brought about by Erskine was Fox's Bill, which is exceedingly limited in its scope, and only refers to criminal libels. This Statute, as we have seen, *declares* and *enacts*, and is consequently said to be *declaratory*, of the common law.

But it is submitted, that the Courts of law, and not the Legislature, have the power to declare what the common law is; and when the Twelve Judges of England, agree upon the subject, we are bound to believe that they are right, in spite of a declaratory Act of Parliament to the contrary. Our Court of Appeals has recently said in the case of *Negley* vs. *Farrow*, 60 *Md.* 158, that Fox's Libel Act is not in force in Maryland, which could scarcely be the case if this legislation were *declaratory* of the common law.

Moreover Lord MANSFIELD stated in the House of Lords, that "declarations of law, made by either House of Parliament, are always attended with bad effects. I constantly oppose them when I have an opportunity, and never in my judicial capacity think myself bound to show them the slightest regard." ‡

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* Maryland Constitution of 1851, Art. 10, sec. 5.

† 2 Debates Constitutional Convention of 1851, 766–767.

‡ 2 Campbell's Lives of the Chief Justices, 470.

ERSKINE seemed to have a peculiar propensity for bringing in bills declaratory of the common law, without regard as to what the law actually had been. It is conceded that he was the originator of 32 *George III*, c. 60. At another time he introduced a bill *declaring* it unlawful, for justices of the peace to hold to bail for libel before indictment. This indisputably had neither been the law or practice. The bill was rejected. Lord CAMPBELL, who like Erskine, was a whig, and who

If we concede that MANSFIELD, BULLER, and all the other English Judges were wrong, and that 32 *George III, c.* 60, *is* declaratory of the common law, it would not tend to establish the affirmative of the proposition under consideration, as the aforesaid Act applies only to criminal libels. Moreover, the law-makers, cognizant of the extreme difficulty that a conscientious jury must necessarily encounter in an attempt to pass upon or decide the law, require the presiding Judge to express his opinion; an exceedingly wise provision, but which unfortunately is not followed in Maryland in criminal trials.

In the language of our Court of Appeals in a late case, "according to the settled law and practice in this State, the Court is *not bound* to instruct the jury (they being by a Constitutional provision made the Judges of both law and fact in criminal cases.) And rarely or never does, except upon consent and request of counsel, both for the State and the accused, or the jury themselves." *Balt. and Yorktown Turnpike Road* vs. *State*, 63 *Md.* 582.

Under our present practice juries are at liberty to disregard all instructions given in criminal cases.

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coincides with the latter's views in regard to the libel trials, referring to this occurrence says: "Lord ERSKINE therefore ought at all events to have made his bill enacting, not declaratory; and I am only surprised, that it was not rejected by a larger majority than 31 to 18." 7 *Lives of the Lord Chancellors, Life of Erskine*, 270.

IV.

AMERICAN AUTHORITIES,

DECISIONS IN THE STATE COURTS.

IN considering trial by jury in criminal cases at common law Blackstone makes use of the following language: "And such public or open verdict may be either general, guilty, or not guilty, or special, setting forth all the circumstances of the case, and praying the judgment of the Court, whether for instance on the facts stated, it be murder, manslaughter or no crime at all. That is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the Court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the King; but not at the suit of the prisoner." 2 *Cooley's Blackstone, Book IV*, 361.

In commenting upon this passage, Judge HOLMAN, of the Supreme Court of Indiana says in *Townsend* vs. *The State*, 2 *Blackford*, 160, "Thus it appears to us to be clear, that although the jury has an unquestionable right to find a general verdict, and in that verdict they may, if they choose to violate their oaths, find contrary to law, or contrary to the direction of the Court, yet in so doing they have passed the proper boundary of their duty. This subject was thus viewed by Judge ADDISON. In his charge to grand juries at the close of his Reports, p. 62, he remarks, that 'strictly and properly it belongs only to Courts to decide all questions of law; but whenever in any issue the law is involved in the fact, the jury may decide both, by a general verdict, but the doctrine of attaints and of new trials, proves that they do this at their peril, and under the control of the Court.'"

Chief Justice LEWIS, of the Supreme Court of New York, said, in *People* vs. *Croswell*, 3 *Johnson's Cases*, 405: "Judge BLACKSTONE has been cited as an authority to the same point, (that juries could pass upon the law,) but in my opinion he emphatically establishes the reverse." He then quotes the above extract and exclaims: "What! men to be punished for a breach of their oaths in exercising

a right. This would be preposterous. The right here spoken of, is nothing more than the right of insisting upon their verdict being received and recorded, though it be general where it should not be so. But is this a species of right, which shall impose it upon a Judge to inform them that they may exercise it, though they violate their oaths? Surely not."

In 1828, the case of *Townsend* vs. *The State* was decided by the Supreme Court of Indiana. The defendant had been indicted for retailing spirituous liquors without license. The Circuit Court instructed the jury, that it was not in their province to determine the law, and this direction formed one of the grounds for appeal. HOLMAN, J., who delivered the opinion of the Court said: "As this presents a question that has been frequently agitated in this State, we have devoted considerable time to its examination."

The constitutional provision had not yet been adopted, and consequently the common law rules were in force. The Court came to the conclusion that juries in crimiual cases were not judges of the law, and affirmed the decision of the lower Court. I insert a few extracts from the opiuion.

"The maxim, *ad quaestionem juris non respondent juratores*, seems to be as old as the common law. See *Co. Litt.* 155, 156.—*Foster's Crown Law*, 255, 256. It had the same origin with the maxim, *ad quaestionem facti non respondent judices.* These two maxims divide and designate the powers of Courts and juries. To Courts are assigned all questions of law; to juries all questions of fact. * *

If juries were authorized to determine matters of law, their rules of decision and consequently the rights of individuals would necessarily be uncertain and fluctuating. They neither have, nor are presumed to have a competent knowledge to decide according to any settled principles, and being so frequently succeeded by each other, it would be impossible in any future time to establish any permanent rules of decision. * * * * * * * * * *

The misapprehension of the province of the jury as to questions of law, has principally arisen, from the fact that they may find a general verdict, which involves the law with the facts, and in finding such a verdict, they may decide the law to be different from what the Court has determined it to be. This they can do, but it is classed by all writers on the subject among their powers of doing wrong. It is *a violation of their oaths*, and surely the question is not how illegally a jury may act, but what is the proper sphere of their action." 2 *Blackford*, 156–159.

BLACKFORD, J. dissented in reference to that part of the decision, which states that the jury have not a right if they please to determine the law, as well as the facts proved; and also to that part of it

which considers that if the jury find a verdict contrary to the instructions of the Court, as to the law applicable to the evidence submitted to them, they thereby violate their oaths. *Ibid*, 162.

In 1856, the case of *Williams* vs. *State*, came up in the High Court of Errors and Appeals of Mississippi. Edward E. Williams had been tried in the Circuit Court of Marshall County for murder, and found guilty of manslaughter in the second degree. The Court below refused to instruct: "that the jury are not only the judges of the facts in the case, but they are also judges of the law." The Appellate Court affirmed the conviction. SMITH, C. J., who delivered the opinion said: "In many of the colonies immediately preceding the Revolution, the arbitrary temper and unauthorized acts of the Judges holding office directly from the Crown, made the independence of the jury in law as well as fact, a matter of great popular importance.

From this cause, the doctrine embodied in the charge under consideration, grew into recognition, and for some time after the adoption of the Federal Constitution, it was generally received. * * * * *In England it has always been held*, that the Court were as much the judges of the law in criminal, as in civil cases, and this doctrine is now undoubtedly sustained by the great weight of authority." 32 *Miss.* 396.

But the most exhaustive exposition upon the subject under consideration, is found in the opinion of Judge GILCHRIST of the Superior Court of Judicature of New Hampshire, in the case of *Pierce* vs. *The State*, 13 *N. H.*, 542. This decision revolutionized the practice in criminal cases in New Hampshire, and the doctrine was there announced for the first time, that juries in criminal cases were not judges of the law. This was in 1843.

Judge DOE, in speaking of this decision twenty-six years later, uses the following language: "In that case, on the question whether the jury are the judges of the law in criminal cases, the common law as universally understood and practised in New Hampshire, from the first jury trial ever held in the State down to 1842, (excepting the change of Judge PARKER'S opinion, stated by him in *Pierce* vs. *State*, 13 *N. H.* 561, was held to be illegal and unconstitutional, and the new doctrine was announced that the jury are not the judges of the law in criminal cases. That doctrine was one of the most startling legal novelties ever introduced into this State, although the only wonder now is, that there could ever have been any doubt of its soundness." *State* vs. *Hodge*, 50 *New Hampshire*, 523.

Pierce had been indicted for violating the Act of 1838, regulating the sale of wine and spirituous liquors. The trial attracted great

attention, owing to the political issues involved. The traverser was found guilty, and took an appeal, but the conviction was sustained.

I give the following extracts from the opinion of Judge GILCHRIST: "I shall confine myself in the opinion I propose to deliver, to stating the judgment of the Court upon the question, whether the jury possess the right to decide the law in criminal cases, leaving the conclusions of the Court upon the other questions that arise in the case to be declared by the Chief Justice.

As a common law question, this must be determined by the authorities. Wherever they lead us, it is our duty to follow. Whatever result they may establish, it is our duty to declare. The Statute Westminster 2, c. 30, (13 Ed. I, A. D., 1285,) is the groundwork of the arguments of those, who assert the right of juries to determine questions of law. In one of Lord Erskine's most eloquent arguments, that in support of the motion for a new trial in the case of *The King* vs. *The Dean of St. Asaph*, he takes the position, that from the words of this Statute, the right of the jury to decide the law upon the general issue was vested in them by the Constitution. Other arguments more or less plausible have been urged in its favor in times of excitement, either from the absence of a sufficiently careful investigation, or because they were adopted to attain particular ends; but this Statute, at first sight, seems more like an authority for the general position, than any argument or decision that has been made since its passage.

The following is a translation of so much of the Act as pertains to this subject: 'The Justices assigned to take assizes, shall not compel the jurors to say precisely whether it be disseizin or not, so that they do show the truth of the fact, and require aid of the Justices; but if they, of their own accord, are willing to say that it is disseizin or not, their verdict shall be admitted at their own peril.' Now, in giving a construction to this Act, Lord Coke says, that the first question was, whether in case of assize, if the issue were joined upon a collateral matter out of the point of the assize, upon this special issue, the jury might give a special verdict, and it was resolved, that in all actions the jury might find the special matter of fact pertinent, and pray the direction of the Court for the law. 2 *Inst.* 425. If any collateral matter, distinct from the general issue of *nul disseizin*, *&c.* were pleaded, then the assize was turned into a jury, instead of a separate recognition to try the fact. *Glanville*, *lib.* 13, *c.* 20, 21. The collateral matter was determined by the same recognitors *in modum juratae.* The jury were therefore limited to the collateral matter of fact out of the point of assize.

But *Glanville* says, that the assize could not decide upon the law connected with disseizin. He states that if the demandant object to put himself upon the grand assize, he must show some cause why the assize should not proceed. If the objection be admitted, the assize itself shall thereby cease, so that the matter shall be verbally pleaded and determined in Court, *because it is then a question of law, &c.* If the assize could not determine questions of law, it would be the most groundless assumption to say, that they could be determined by the jury, who were to find only collateral facts, out of the points of assize.

The citation from *Glanville* is a strong authority against the right of the jury to decide the law upon a general issue involving law and fact.* The implication from the latter part of the clause cited from the *Stat. Westm. 2nd*, is a strong argument against it. If the jury, 'of their accord, are willing to say, that it is disseizin or not, their verdict shall be admitted, *at their own peril.*' But what peril could they incur, if, by deciding the law, they simply exercised a right given them by the Statute? This phraseology is most singular, if the Statute was intended to submit the law to them. The reasonable construction of it is, that if the jury will undertake to decide the law, they shall be subject to such penalty, as may be imposed upon them for exceeding their jurisdiction. If they should incur a penalty, the act for doing which the penalty is imposed must be illegal, for nothing is better settled than that a penalty attached to the performance of an act, makes the act itself unlawful." 13 *New Hampshire*, 544, 545.

The learned Judge then cites *Townsend's Case*, *Plowd.* 111; *Willion* vs. *Berkeley*, *Plowd.* 223; *Grendon* vs. *Bp. of Lincoln*, *Plowd.* 493; *Coke upon Littleton*, 71 *b*, 72 *a*; *I bid*, 125 *a*; *Oneby's Case*, 2 *Ld. Raymond*, 1494; *Trials Per Pais*, *c.* 14; *Rex* vs. *Dean of St. Asaph*, 3 *T. R.* 430, and goes on to say, that these authorities "sufficiently establish the general position, that the jury are not to decide questions of law. But able and learned men have nevertheless expressed the opinion, that it was their (the jury's) right so to do in certain cases. Among them is the celebrated *Junius*. But the '*magni nominis umbra*,' the political partizan, * * * * the brilliant rhetorician, who too often substitutes a showy antithesis for an argument, is scarcely entitled to rank as an impartial, legal authority. Sir John Hawle's pamphlet published in the heat of the party excitements of 1680, must be placed in the same

* *Ranalfus De Glanville*, was a lawyer, statesman and soldier, and occupied the the office of Chief Justiciar under Henry II. He is the author of "A Treatise on the Laws and Customs of the Kingdom of England," and is considered the father of English Jurisprudence. 1 *Campbell's Lives of the Chief Justices*, 24–25.

category. And M. De Lolme, in his work on the English Constitution, although it would be unjust to rank him with these party writers, must be regarded simply as a learned foreigner, and sometimes showing that want of thoroughness and precision, which even a learned man may display when writing on subjects which his previous education had not particularly fitted him to appreciate, and especially when discussing such a subject as the common law of England.

The opinion of another eminent man, Mr. Hargrave, in *note*, p. 276 of the second book of the *Institutes*, is deserving of more attention. He acknowledges that questions of law generally and more properly belong to the Judges,* yet as the jury may as often as they think fit, find a general verdict, he thinks it was unquestionable that they might so far decide the law as well as the fact, such a verdict necessarily involving both. He says, that for his opinion he has the authority of Littleton himself, who states in section 368, that if the jurors will take upon them the knowledge of the law upon the matter, they may give their verdict generally as put in their charge.

The opinion of Mr. Justice KENT, in the *People* vs. *Croswell*, 3 *Johns. Cases*, 404, and the cases of *Commonwealth* vs. *Knapp*, 10 *Pick.* 496; *Comm.* vs. *Kneeland*, 20 *Pick.* 222, and *State* vs. *Snow*, 18 *Me.* 347, are authorities to the same effect." 13 *New Hampshire*, 546.

These cases will be subsequently considered.

Continuing the Court says: "Now it is to be remembered that Littleton in the section cited, was not examining the rights or powers of juries. He was discussing matters very different. The passage was introduced in explaining the pleadings in real actions relative to estates upon condition. His remarks are in brief, that after an estate-tail is determined for default of issue, the donor may enter by force of the condition. But in the pleadings he must vouch a record, or show a writing, under seal, proving the condition; but though no writing was ever made of the condition, a man may be aided upon such condition by a verdict taken at large upon an assize of novel disseizin, for as well as the jurors may have conusance of the lease, they also as well may have conusance of the condition which was declared and rehearsed upon the lease. And in all actions where the justices will take the verdict at large, there the manner of the whole entry is put in issue. He then adds: 'If they will take upon

* Hargrave's views are in entire accord with the decision in *Pierce's Case*. See part II, *supra*, 8-9.

In Proffat on *Jury Trial*, the author correctly states, that "the authorities in England are most elaborately examined by Mr. Hargrave, in a note to the third volume of his edition of Coke upon Littleton, wherein he proves the fallacy of the doctrine" [that juries are judges of the law.] Sec. 374, note 4.

them the knowledge of the law upon the matter, they may give their verdict generally as put in their charge.' An extended examination of the rights of juries would have been foreign to the particular matter in hand, and it was necessary for him merely to state the effect of a general verdict relative to estates upon condition. *Littleton's Treatise* was written in the reign of Edward IV, between the years 1461 and 1483, and his remark is nothing more than a cursory statement of the provision of the *Stat. Westm. 2nd.* It is plain from Lord Coke's Commentary, that he did not understand Littleton as laying down the limits of the duties of jurors, or as meaning to go any further than to allude to this Statute. *Coke* says: 'Although the jurie, if they will take upon them (as Littleton here saith,) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to doe, for if they doe mistake the law, they runne into the danger of an attaint.' *Co. Litt.* 228 *a.* This by no means admits, but substantially denies the right of juries to decide the law. If they may settle the law, their conclusion *is* the law, and they cannot 'runne into the danger of an attaint.'" 13 *New Hampshire*, 546–7.

Judge GILCHRIST subsequently refers to the opinions of Chief Justice LEWIS in *People* vs. *Croswell*, 3 *Johns. Cases*, 403; Mr. Justice STORY in *United States* vs. *Battiste*, 2 *Sumner*, 243; Judge KENT in *People* vs. *Stone*, *N. Y. Express*, May 17, 1842; *Townsend in Error* vs. *The State*, 2 *Blackford's Reports*, 152, and observes:

"The eminent lawyers, who delivered the above opinions, held that the jury could not determine the law. And the result at which we have arrived is, that *juries have not the right to decide the law in any case; that this accords with the best authorities in the common law*, and with other legal rights which must be surrendered, if they may decide the law and that they are bound, by the law, as laid down to them by the Court." 13 *New Hampshire*, 551.

And now a word as to the authorities in favor of the affirmative of the subject under consideration.

The People vs. *Croswell*, 3 *Johns. Cases*, 364 to 376; *State* vs. *Snow*, 18 *Maine*, 346; and *Warren* vs. *State*, 4 *Blackford*, 150, are cited by the counsel for the plaintiff in error, in *Franklin's Case*, 12 *Md.*, 240; while *Commonwealth* vs. *Knapp*, 10 *Pickering*, 496; and *Commonwealth* vs. *Kneeland*, 20 *Pickering*, 222, are mentioned by Judge GILCHRIST in *State* vs. *Pierce*, as additional adjudications in favor of this right.

Croswell's Case is announced as the leading authority in support of the doctrine, that juries in criminal cases can decide the law. Upon examination, we find that it cannot be classed as endorsing

such a principle. Croswell had been indicted in February, 1804, for publishing a libel * upon Thomas Jefferson, and found guilty. The case excited great popular interest, and as Chief Justice LEWIS expressed it, "a printer charged with a libellous and malicious publication has called forth in his defence the gratuitous exertion of the choicest talents that grace this bar." *People* vs. *Croswell*, 3 *Johns. Cases*, 394.

Motion was made for a new trial. Hamilton, Harrison and Van Ness appeared for the accused, and claimed that the Court below had misdirected the jury in charging them, that in cases of libel, they were not the judges of law and fact.

The Supreme Court of New York being equally divided upon the question, the motion did not prevail.

The Chief Justice stated that the Judges were prepared to give their reasons at length, but it was not thought requisite, and the opinions are inserted in the appendix to the volume.† This can therefore scarcely be cited as an authority in favor of the right of juries to decide the law in criminal cases. The decision of the lower Court having been permitted to stand, became the law of the case, and goes to establish the correctness of our contention.

LEWIS, C. J., and LIVINGSTON, J., were in favor of affirming the conviction; KENT and THOMPSON, JJ., were for a reversal, and SPENCER, J., having while Attorney-General, prosecuted the defendant, was disqualified.

Justice KENT delivered an opinion, and his reputation as a jurist has confounded this with the case, and caused it to be cited as an authority for the affirmative of the proposition under discussion. It must be borne in mind, that he had under consideration a libel case, where the turning point was whether or not *intention* was a question

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* The indictment set forth the libel as follows:

"'Jefferson (the said *Thomas Jefferson, Esq.*, meaning) paid *Callender* (meaning one *James Thompson Callender*) for calling Washington (meaning *George Washington Esq.*, deceased, late President of the said *United States*,) a traitor, a robber, and a perjurer; for calling *Adams*, (meaning *John Adams, Esq.*, late President of the said *United States*,) a hoary-headed incendiary, and for most grossly slandering the private characters of men, who he (meaning the said *Thomas Jefferson*) well knew to be virtuous;'—to the great scandal and infamy of the said *Thomas Jefferson*, Esq., President of the said United States, in contempt of the people of the said State of New York, in open violation of the laws of the said State, to the evil example of all others in like case offending, and against the peace of the people of the State of New York, and their dignity." 3 *Johns. Cases*, 338, 339.

† *People* vs. *Croswell* was argued at the February Term, 1804. On April 6th, 1805, an Act was passed by the New York Legislature, similar to "Fox's Libel Act." In consequence of which Statute, the Court, at the August Term, 1805, awarded a new trial, no motion having been made by the State for judgment on the verdict.

of law or fact, and the great Judge admitted that since the time of Lord HOLT, (1704) the question has been an unsettled and litigious one in Westminster Hall. But it is submitted that such doubts were cleared away by the luminous judgment of Lord MANSFIELD, in the *Dean of St. Asaph's Case*, and its subsequent affirmance by the Twelve Judges of England.

Chief Justice PARKER, of New Hampshire, who delivered a concurring opinion in the case of *Pierce* vs. *The State*, in alluding to *The People* vs. *Croswell*, informs us that Justice THOMPSON, who concurred with Justice KENT, "must have understood that concurrence to be merely in the points necessary to the decision of that cause, or have subsequently changed his views, for I have *his authority* for saying, that he has repeatedly ruled that the jury are not judges of the law in criminal cases." 13 *N. H.* 564–5.

The two Massachusetts decisions above noticed, *Commonwealth* vs. *Knapp*, and *Commonwealth* vs. *Kneeland*, have been overruled by the Supreme Court of that State in the case of *Commonwealth* vs. *Porter*, 10 *Metcalf*, 286. Chief Justice SHAW who delivered the opinion of the Court said:

"But it is the duty of the Court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions, pertinent to the issue, upon which either party may request the direction of the Court, upon matters of law. And it is the duty of the jury to receive the law from the Court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them. And it is not within the legitimate province of the jury to revise, reconsider, or decide, contrary to such opinion or direction of the Court, in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent and in the same manner as they are conscientiously bound to decide all questions of fact according to the evidence."

The case of *State* vs. *Snow*, 18 *Maine*, 346, has been reversed by the Supreme Court of Maine, in *State* vs. *Wright*. Judge WALTON, who delivered the opinion of the Court, in referring to *Snow's Case*, uses the following language:

"The Court seems to have taken it for granted that the law was settled in favor of the right of the jury to determine the law in criminal cases, and gave the question apparently very little consideration. Two cases only are cited. One of them, (*Croswell's Case*, 3 *Johns. Cases*, 337,) establishes no such doctrine; and the other (*Com.*

vs. *Knapp*, 10 *Pick.* 497,) has been emphatically overruled by the same Court which made the decision." 53 *Maine*, 337–8.

The case of *Townsend* vs. *The State*, has been referred to. Shortly afterwards, *Warren* vs. *State* came up in the Supreme Court of Indiana. Judge BLACKFORD, who dissented in the former case, delivered the opinion of the Appellate Court. Without assigning any reasons, or citing any authority, and in direct opposition to the law as laid down in *Townsend's Case*, he reversed the judgment of the lower Court, because it had *refused* to instruct the jury that they were judges of the law as well as the facts. 4 *Blackford*, 150.

The question, as already noted, has been set at rest in Indiana by a constitutional enactment.

V.

AMERICAN AUTHORITIES.

TEXT BOOKS AND DECISIONS IN THE STATE COURTS.

IN *Proffat on Jury Trial, Sections* 374–376, we read:

"The power of *attaint* controlled a wanton exercise of this power [to pass upon the law and fact]. Lord COKE says: 'Although the jury, if they will take upon them the knowledge of the law, may give a general verdict, yet it is dangerous for them to do so; for if they mistake the law, they run into danger of an attaint; therefore to find the special matter is the safest way, where the case is doubtful.'

When the power of attaint became obsolete, and new trials were introduced, it became an established practice for the jury to be guided by the Court in the application of the law, otherwise the Court would set aside the verdict rendered against the instructions of the Court. Thus the practice became formulated into the well known and old maxim, *ad quaestionem facti, etc.* The right of the Court to declare the law to the jury *who are to be bound by it*, has many times been emphatically declared in English legal history.

So far back as 1649 on the trial of Col. Lilburne, the Court resented with much warmth the insinuation that the jury could decide the law. One of them (JERMYN) in language more emphatic than elegant, pronounced the doctrine 'a damnable, blasphemous heresy,' and the jury were instructed by the Chief Justice, that they were not the judges of the law; that they 'ought to take notice of it that the Judges, who are twelve in number, and who are sworn, have ever been the judges of the law, from the first time we can read or hear that the law was truly expressed in England, and the jury only judges of matter of fact.'

The power and the right of deciding the law have been confounded in the discussion of this subject; and often if a distinction were made as to the *power* and the *right* of the jury, the

authorities would not be so discordant. It cannot be denied that the jury in criminal cases have the *power*, which is often too freely exercised to decide upon the law, and if improperly exercised will in some cases be irremediable.

But if the question be as to their *right* to decide the law, it is entirely a different matter. It may be safely asserted that *in a large majority of our States this right is denied.* Otherwise there will be very little meaning in Appellate Courts and new trials, which proceed upon the assumption that a mistake of law has been made either by the Court or the jury. The preponderance of judicial authority in this country is in favor of the doctrine, that the jury should take the law from the Court, and apply it to the evidence under its direction."

Wells, an eminent legal writer, in discussing the question under investigation says:

"On the whole, the weight of reason and authority appear decidedly to support the views of those, who deny the unrestricted, uncontrollable right of a jury to decide the law in a criminal case. Yet all agree, that if a jury usurp such a right, the matter is remediless, where the prisoner is thereon discharged; and so far the only restraint really or practically in operation is a moral not a legal one. The negative doctrine may however often be of practical benefit in cases of conviction, it affording a ground of appeal, when perhaps there is no other. There seems too an inherent incongruity moreover in the position, that the jury are judges of the law, and yet are required to be informed by the Court, what the law is, the Judge being, as one Court has expressed it, a witness in the case so far as an expert for the information of the jury. In a measure the jury does determine both law and fact, in all cases, civil and criminal, but that they do so with any better or more extended right in the latter than in the former, is certainly more than doubtful." *Wells on Questions of Law and Fact, p.* 49, *sec.* 36.

In *Worthington on Juries*, we find the law laid down as follows:

"The power to grant new trials, which is vested in the Judges of the Superior Courts, in the several cases before mentioned, could not have subsisted, if a jury had possessed the right of deciding questions of law. *Juries are not constitutionally presumed to know, and in fact do not know the law.* Were they permitted to decide the law, the principles of justice would be subverted; the law would become as variable as the prejudices, the inclinations, and the passions of men. If they could legally *decide* upon questions of law, the decision must of necessity be final and conclusive, which would involve an absurdity in all judicial proceedings, and

would be contradictory to the fundamental principles of our jurisprudence." *Law Library*, 29, *star page* 193.

The case of *State* vs. *Jeandell and Vincent* is reported in 5 *Harrington*, (*Delaware*,) 482. The defendants had been convicted of libel; Chief Justice BOOTH having charged the jury that the publication in question was libellous. Motions for a new trial, and in arrest of judgment were made, but the Appellate Court affirmed the decision in the following opinion:

"The defendants' counsel has rightly said that the question involved in this case was (*as a political question*) in controversy for a great many years; but it was settled both as a political and a legal question as early as 1792 in England, namely by Statute 32 Geo. III, which has been followed by our own Constitution, and the Constitution of nearly every State in the Union. * * * *

We commenced the charge in the very words of the Constitution, namely, that 'in all indictments for libels, the jury may determine the facts and the law as in other cases,' and if we were misunderstood on this subject, it must be because neither our language nor that of the Constitution itself can make it plain. But we were not misunderstood, at least by the jury. They not only understood that they had the power under our charge to judge both of the law and the fact; but they *exercised* that power, and the same jury on the same facts, and under the same charge, (the two cases being tried together) found the defendants guilty in the one indictment, and not guilty in the other.

But while we stated to the jury that they had the power (and must necessarily exercise it in finding a general verdict) to judge of the facts and the law, we did say to them, and we repeat that whether any publication be a libel or not, *is a question of law;* that all questions of law are for the Court to instruct the jury upon, and that it is the duty of the jury to take the law from the Court, as they take the facts from witnesses, and make their verdict accordingly. This is a principle of *the utmost consequence to life and liberty as well as property.* It extends to all criminal cases as well as to libels; for there is no difference in this respect between the law of libel and of murder, or of assault and battery. What is an assault is a question of law; what is murder is a question of law, and so of libel. Whether in a given case the facts amount to murder or assault, or libel, is a matter for the jury, *under the direction of the Court on the law.*

The Judge defines the offence, he states or assumes or supposes facts necessary to make the offence, and tells the jury if such facts are proved, it is murder, or assault, or libel; and as the words of a

libellous writing are certain, he says at once, that it is or it is not a libel. The jury take that as the evidence of the law, they turn to the witnesses for the evidence of the facts; and compounding their verdict of law and fact, judging in this sense of the facts and the law, they render a general verdict of guilty or not guilty.

This is a plain, practical and safe system. But to say that the jury are judges of the law in the same sense as they are judges of the facts, *would be an exceedingly dangerous principle.* The law of one jury might not be the law of another jury, and if they erred through ignorance or otherwise, there would be no correction. If the Judge err in misstating a legal principle, the remedy is easy, by motion for a new trial or other proceeding to review his principles; if the jury act on a misconception of law there is no remedy unless on our principle, that legal questions in criminal as in civil cases, belong to the Court which has the power to correct such mistakes of the jury, by granting new trials.

This is the greatest protection to the accused, his highest and best security against oppression; for a jury may under excitement or popular prejudice *convict,* as well as acquit against law; to whom then shall the accused look for protection, if the jury are the judges of the law? Take the case of these defendants and suppose the Court had charged in either of the cases, that the publication was no libel; but the jury in the exercise of a power that is conceded to them, had brought in a verdict of guilty; it would be in vain to turn to the Court for protection, if the jury are judges of the law as well as of fact. And when we extend this principle to other crimes, even more difficult in their construction and more dangerous in their consequences, the establishment of such a principle would be alarming. There is no such principle and never has been in Delaware.

The question as one of speculation and of declamation, is not new in our Courts; it is as old as the Courts are; but as a legal principle *it has been repudiated and turned out of Court as often as it has been presented,* and often with much less courtesy than we have thought proper to treat it, and its advocate, on this occasion."

This case has been cited with approval by the Appellate Court of South Carolina, in *State* vs. *Drawdy,* 14 *Richardson,* 89–90. Chief Justice DURKIN said: "The misdirection upon which the counsel chiefly relied was the instruction, that the jury were not judges of the law as well as the facts in the trial of capital felonies. Upon this subject, it cannot be said that there is either doubt or difficulty. The jury have the power (and in finding a general verdict must necessarily exercise it) to judge of the facts and the law. But it is the duty of the Court to instruct the jury upon all ques-

tions of law, and *it is the duty of the jury to take the law from the Court, as they take the facts from the witnesses*, and make their verdict accordingly. This is a principle of the utmost consequence to life and liberty as well as property."

In the case of *State* vs. *Wright*, which has already been briefly alluded to, the Supreme Court of Maine uses the following language: "The most important question raised by the bill of exceptions in this case is, whether in the trial of criminal cases, the jury may rightfully disregard the instructions of the Court in matter of law, and if they think the instructions wrong, convict or acquit contrary to such instructions. In other words, whether they are the ultimate, rightful, and paramount judges of the law as well as the facts.

Our conclusion is, that such a doctrine cannot be maintained; that it is *contrary to the fundamental maxims of the common law; contrary to the uniform practice of the highest Courts of judicature in Great Britain, where our jury system originated and matured; contrary* to a *vast preponderance of judicial authority in this country;* contrary to the spirit and meaning of the Constitution of the United States, and of this State; contrary to a fair interpretation of our legislative enactment, authorizing the reservation of questions of law for the decision of the law Court, and the allowance of exceptions; contrary to reason and fitness, in withdrawing the interpretation of the laws from those who make it the business and the study of their lives, to understand them, and committing it to a class of men, who being drawn from non-professional life for occasional and temporary service only, possess no such qualifications, and whose decisions would be certain to be conflicting in all doubtful cases, and would therefore lead to endless confusion and perpetual uncertainty." 53 *Maine*, 329, 330.

This is very strong language, and derives additional force from the fact that it had previously been held in this State, that juries in criminal cases *could* decide the law.

The Court further pertinently remarks: "Law should be certain. It is the rule by which we are to govern our conduct. To enable us to do so, we must know what the law is. Doubtful points ought therefore to be settled, not for the purpose of a single trial only, but finally and definitively.

If each successive jury may decide the law for itself, how will doubtful points ever become settled. They will be bound by no precedents. They may not only disregard the instructions of the presiding Judge and the verdicts of all former juries, but they may also disregard the decisions of the law Court. * * *

In doubtful cases—cases where authoritative expositions of the law are most needed—we should undoubtedly have conflicting verdicts, and the law would remain in perpetual uncertainty. Difficult and important questions of law arise in criminal as well as in civil suits. There is scarcely an Act of Congress, or of our State Legislature, the construction, interpretation, or validity of which may not be brought in question in a criminal prosecution. Technical terms are to be explained, conflicting provisions reconciled, their prospective or retrospective operation ascertained, their effect to repeal or restore former statutes considered, and their constitutionality determined. To do this, often requires much time, careful thought, the examination of numerous authorities and a familiarity with the law as a science, which a life-time of preparatory study is scarcely sufficient to supply.

Juries are generally composed of upright men, willing and anxious to discharge their duty to the best of their ability. But they are drawn from non-professional life, and lack the advantage of a legal education. When a cause is finally committed to them, they are put under duress of an officer, and are not allowed to separate till their consideration of the case is closed. They are not allowed the use of books, not even the statutes which they may be required to construe. Twelve men thus situated may be admirably qualified to weigh evidence and determine facts, and may be justly entitled to all the encomiums passed upon them, in that respect, but it is impossible to believe they constitute a suitable tribunal for the determination of important and intricate questions of law." 53 *Maine*, 338, 339.

In *Force's Harris' Criminal Law*, (*note*, 339,) the text book in use in the Law Department of the University of Maryland, we are informed that "there was a tendency in the Courts to hold that the jury has the right to decide the law as well as the facts in criminal prosecutions. The current has changed, and it is now generally settled that the jury are *not* judges of the law, but must take the law from the Court."

In *Wharton on Criminal Law*, (*7th Ed., Vol. III, Sec.* 3269,) an authority of high rank, we read:

"In England, it has always been held that the jury are no more the judges of law in criminal than in civil cases, with the qualification, that owing to the peculiar doctrine of *autrefois acquit*, a criminal acquittal cannot be overhauled. In this country [the United States] such is the prevailing sentiment."

The common law rule, that the jury must take the law from the Court is followed in Maine, New Hampshire, Massachusetts, Rhode

Island, New York, Pennsylvania, Virginia, North Carolina, Ohio, Kentucky, Alabama, Mississippi, Missouri, Arkansas, California, South Carolina and Texas. In Vermont, Tennessee, Georgia, Maryland, Louisiana, Illinois and Indiana the contrary is held. 3 *Wharton on Criminal Law, sec.* 3278. Two of these States* have constitutional provisions making the jury judges of the law.

The Constitution of Indiana, (1851, Art. I, sec. 19,) provides that: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." In *Lynch* vs. *The State*, 9 *Indiana*, 541, the Supreme Court held that by virtue of this section, the jury had the right to pass upon the constitutionality of an Act of the Legislature.

In *Williams* vs. *The State*, 10 *Indiana*, 503, 504, the same Court in effect decided, that this constitutional provision was *not declaratory* of the common law. The Court conceded that this *was not* the rule at common law, and declared that the position assumed in *Townsend* vs. *The State*, was correct. It must be borne in mind, that though *Townsend's Case* was decided before this clause was adopted, yet the subsequent affirmance in above particular, makes that decision an important authority, in support of the negative of the doctrine under consideration.

It will be observed that these two cases are in direct conflict with the adjudication of the Court of Appeals of Maryland, in *Franklin* vs. *The State.*

In *Williams* vs. *The State*, the Court cites *Wharton on Criminal Law*, in connection with this question, and remarks that "*in this country the same rule of decision is sustained by a weight of authority, which seems to be conclusive.*"

It is worthy of comment, that notwithstanding above constitutional provision, and the broad effect given thereto by the Supreme Court of Indiana, the Legislature of that State, has wisely enacted, that in the charge to the jury in criminal cases, the Court shall make mention of "all matters of law, necessary for their information in giving their verdict." 2 *Rev. Stat. of Indiana*, 376; *Williams* vs. *State*, 10 *Ind.* 505.

Professor WHARTON is an earnest advocate of the common law rule, that juries cannot decide the law. I insert a few extracts from his Treatise.

"Certainly, with jurors, no settled rule could be had as to what the offence is, or if there was, no one could undertake to classify

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*Maryland and Indiana.

their decisions. Or again, when the question arises, whether the uncorroborated evidence of an accomplice is enough to convict in a particular case, a question in which the judiciary of almost each State holds a distinct shade of opinion, where would be the chances of uniformity of adjudication, if juries acting on the particular circumstances at hand, are to be the arbiters." 3 *Wharton on Criminal Law, sec.* 3265, *7th Ed.*

"But a practical illustration of much point is found in a case to which may be attributed the change of sentiment on this question of the late Mr. Justice BALDWIN, a Judge, who it is well known, was not disposed on light grounds to surrender any long cherished opinions. On several occasions in his early judicial history, he was unequivocal in his commitment of the whole law to the jury; and in one instance after counsel had directly appealed from the Court to the jury on a legal point, he went so far as to say, that in so doing, they had but acted in the strict line of their duty. *U. S.* vs. *Wilson*, 1 *Bald.* 99. But when some time afterwards, counsel profiting by this encouragement, undertook to open to the jury on an indictment for counterfeiting United States bank notes, the unconstitutionality of the bank's charter, the learned Judge paused. He felt, that however legitimate a result of his own reasoning this course was, if permitted it would defeat all prosecutions for the particular offence on trial. 'Should you assume and exercise this power' he said, in language which applies with equal force to all questions of law whatever, 'your opinion does not become a supreme law, no one is bound by it, other juries will decide for themselves, and you could not expect that Courts would look to your verdict for the construction of the Constitution, as to the acts of the legislative or judicial departments of the Government; nor that you have the power of declaring what the law is, what acts are criminal, what are innocent, as a rule of action for your fellow-citizens or for the Court. If one jury exercises this power, we are without a Constitution or laws. One jury has the same power as another; you cannot bind those who may take your places. What you declare constitutional to-day, another jury may declare unconstitutional to-morrow.'" * * * * * *Ibid, sec.* 3266.

"But in practice, however speciously the doctrine, [that juries have the right to decide the law,] may be asserted, it is, except so far as it may sometimes lead a jury to acquit in a case where the facts demand a conviction, practically repudiated; and since its only operation now is mischievous, it is time, it should be rejected in theory as well as reality. For, independently of the reasons already mentioned, an attempt to carry it out in practice, would involve a trial in endless absurdity. Thus, for instance, what

questions of law are of more vital interest to a prisoner on trial than those of the admissibility of dying declarations, or of confessions? If the jury are to judge of the law, what grosser invasions of their rights and those of the prisoner could there be, than to take from them the decision of questions thus distinctly within their province, and which, so far from being collateral to, as has been urged, are in most instances direct to the matter of guilt? And yet, there is no Judge sitting, with a jury on the trial of a criminal case, who does not take to himself alone the hearing of the preliminary evidence as to whether the declarations were uttered under a consciousness of approaching dissolution, or whether the confession was extorted by duress, or solicitation. The line of authority here and in England is unbroken, that in such and in kindred cases, the Court alone is to determine. But if such be the law, as a matter of principle, the jury have no more moral right to convict or acquit a man against the charge of the Court, that such evidence was to be stricken out, if improvidently let in, than they would to convict or acquit him on the evidence if actually excluded." *Ibid*, *sec.* 3267. "This view is perhaps strengthened by the fact, that in England and this country, the statutory or constitutional provisions giving juries the power of determining as to whether a written document is unlawful or not, go no further than the particular instance of indictment for libel." *Ibid*, *sec.* 3268.

Wharton enumerates Tennessee, as one of the States, where the common law rule is not in force. He cites *Nelson* vs. *State*, 2 *Swan's* (*Tennessee*,) 237, in support of this assertion. It is submitted, that this case does not so decide, but in reality leans the other way. The facts were as follows:

Nelson, a slave, had been convicted in the Court below of murder. The Judge had delivered a charge to the jury, which the Appellate tribunal held to be a correct exposition of the law as far as it went, yet the conviction was reversed and a new trial awarded. The Court of Appeals ruled, that while it is true generally, that a failure to charge fully, when there is no essential point omitted, or wrongfully charged is not error, unless it appear that the Court was asked for further instructions; still, upon the trial of a capital offence *it is error*, if the Court, (although expounding the law correctly so far as the charge goes,) *omit to instruct the jury fully and explicitly upon the legal effect of all the circumstances developed upon the trial*, which would tend to determine the character or degree of the prisoner's guilt. The Court said, that the proof "as written down is hardly sufficient to sustain the verdict; and for this reason, and because we think the defendant did

not have the advantage of a full explanation of the law on the points before designated, we reverse the judgment refusing a new trial, and remand the prisoner for another trial." *State* vs. *Nelson*, 2 *Swan's*, 263.

The case of *McGowan* vs. *The State*, 9 *Yerger*, 194, had been decided by the same Court, about twenty years before, and appears to have escaped the attention of the learned commentator. It is an authority, which seems to confine juries in criminal cases to their common law powers. The Bill of Rights of Tennessee, sec. 19, gave the jury the right to try the law and the fact in libel, "as in other cases,"—embodying the provisions of Fox's Libel Act. In *McGowan's Case*, the Court below in its charge to the jury said: "The Court is to be the judge of the law, and the jury exclusively the judges of matters of fact, and it is the duty of the jury to receive the law as laid down and expounded by the Court, and the jury are not the exclusive judges of the law." It was claimed upon appeal that this instruction was erroneous, but the Appellate Court affirmed the conviction and held, that while the charge excepted to, may perhaps be "wanting in precision," it did not constitute ground of error upon which a reversal should be decreed.

The case of *State* vs. *Croteau*, a Vermont decision, is one of the few authorities upon the affirmative side of the question under discussion. It was there held by a divided Court, that as a common law question, juries in criminal cases could decide the law as well as the facts. Judge BENNETT dissented in a most exhaustive opinion. 23 *Vermont*, 14, 48–81.

Sometime afterwards, the case of *State* vs. *McDonnell*, came up in the Supreme Court of Vermont. The accused was charged with murder. Judge BENNETT presided at the trial below, and instructed the jury as follows: "I have a word to say in regard to the jury being judges of the law as well as the facts. That is the theory in some States, and Governments, while it is denied in others; and to me it is a most nonsensical and absurd theory, but for the purposes of this trial, we charge you that such is the law of this State." 32 *Vermont*, 523.

It was contended that this instruction constituted ground for reversal, but Chief Justice REDFIELD, who delivered the opinion of the Appellate Court said: "We see no objection where the interference of a jury is directly invoked in a criminal case, to the Judge stating to the jury in his own way, that this rule is not intended for ordinary criminal cases; that it is a matter of favor to the defendant, and should not be acted upon by the jury, except after the most thorough conviction of its necessity and propriety;

that any departure by the jury from the law laid down by the Court must be taken solely upon their own responsibility; and that the safer, and better, and fairer way in ordinary criminal cases, is to take the law from the Court, and that they are always justified in doing so. This is substantially what was done by the Court below, and we see no just ground of exception to the mode in which it was done." *Ibid*, 532–3.

In *Carpenter* vs. *The People*, 8 *Barbour*, 610, 611, Judge WELLS, of the Supreme Court of New York State, observed: "The idea, which has become somewhat current in some places, that in criminal cases, the jury are the judges of the law as well as the facts *is erroneous, not being founded upon principle, or supported by authority.* Courts of record are constituted the sole judges of the law in all cases that come before them."

In *Duffy* vs. *The People*, 26 *New York*, 591, 592, Judge SELDEN, who delivered the opinion of the Court of Appeals, uses the following language: "I entertain no doubt that it is as much the duty of jurors to be governed by the instructions of the Court upon legal questions in criminal, as it is in civil cases." The learned Judge then gives a number of reasons for this opinion. I insert the first three:

"1st. The selection of jurors from all classes of the people, whose education and business cannot as a general rule have qualified them to decide legal questions, renders it unreasonable as well as apparently unsafe to require them to pass upon such questions.

2nd. If jurors were to determine the law, its stability would be subverted, and it would become 'as variable as the prejudices, the inclinations and the passions of men.' Every case would be governed, not by any known or established rule, but by a rule made for the occasion. Jurors would become not only judges, but legislators as well.

3rd. All questions in regard to the admission or rejection of evidence being questions of law, are required to be decided by the Court. If jurors are to decide law and fact, their jurisdiction should extend to these questions, which often control the verdict."

Though there was some difference among the members of the Court upon other points, yet all the Judges agreed, that the jury are bound by the instructions of the Court as to the law.

In the case of *People* vs. *Finnegan*, Judge PARKER of the Supreme Court of New York, most clearly expressed his views. Finnegan had been convicted of robbery in the first degree, and

took an appeal. The Court below, had charged the jury, that they were the judges of the law and the fact, and that the only duty of the Court was advisory. This was held to be erroneous, and a new trial was awarded.

Judge PARKER in delivering the opinion said:

"A wrong impression on this point has prevailed to some extent in the community, and it is time it was corrected. The doctrine that the jury are to decide the law in criminal cases, with the single exception made by our State Constitution, [in libels] cannot be supported either upon principle or by authority." 1 *Parker's Criminal Cases*, 153.

The Supreme Court of Texas in *Nels* vs. *The State*, 2 *Texas*, 282, held that:

"The Judge is the organ and expositor of the law, and is placed on the bench to explain it to the jury. It is not only his privilege *in all cases*, but his duty, when called on to state what the law is. In the language of the Court of Appeals of Kentucky: 'If the Judge had not the right to decide on the law, error, confusion, uncertainty and licentiousness would characterize the criminal trials, and the safety of the accused might be as much endangered as the stability of public justice certainly would be. 3 *J. J. Marshall*, 149.' "

An interesting case in point, came up in Arkansas in 1853, in *Pleasants* vs. *The State*, 8 *Eng.* 372. It had previously been held, that in all criminal prosecutions, the jury were, under the laws and Constitution of Arkansas, the judges both of the law and the evidence. 2 *Eng.* 60.

Pleasants, a slave had been convicted under a statute, making it a capital offence, for a negro or mulatto to attempt to commit the crime of rape on a white woman. The Court below had granted a prayer at the request of the accused's counsel, "that the jury were the judges of the law and the evidence." The conviction was reversed for other causes, but Chief Justice WATKINS, who delivered the opinion of the Supreme Court, in commenting upon this instruction said:

"The instructions given were sufficiently favorable for the accused except one, possibly the *very last charge which the prisoner, in his condition should have asked for*, and that was, 'that the jury are the judges of the law and the evidence.' If the Court had charged the jury that they were bound to receive the law when given from the Court, but that in cases where the issue involves a mixed question of law and fact, they are necessarily the judges of the law and

testimony, because they must apply the law to the testimony, in order to determine the criminal intent with which the act was done, it would have saved to the defendant, the full benefit of his right to an impartial trial by jury, and the Court would at the same time, have maintained its own dignity, and its constitutional authority.

If in any case the jury are subject to the outside pressure of popular excitement against the accused, the right of the Court to declare what the law is, and the duty of the jury so to receive and apply it to the facts they find to be proven, may be the only shield and protection that are left to him.

The case here does not call for any discussion of the proposition that the jury are the judges of the law and the evidence. Supposing it to be an error, it is one of which the appellant cannot complain, and we only notice the charge, because *if taken in the literal and commonly received acceptation* of the terms used, it becomes a *heresy, that is subversive of all law.*"* 8 *Eng.* 372–3.

The question under discussion has been repeatedly decided in Alabama in accordance with the prevailing current of authority. *State* vs. *Jones*, 5 *Alabama*, 666; *Pierson* vs. *State*, 12 *Alabama*, 149; *Batre* v. *State*, 18 *Alabama*, 122.

In the case of *Batre* vs. *The State of Alabama*, Chief Justice DARGAN said:

"We are satisfied after a deliberate examination of this question, independent of our own decisions upon the subject, that *the jury are not the constituted judges of the law in any case, unless they be made so by statute.* The whole theory of our criminal jurisprudence disputes this. * * * *

We know it has been said by Courts of respectable authority, that the jurors in a criminal case are the judges of the law, as well as of the facts, but we think this opinion arises from not distinguishing between the powers that a jury may assume to exercise, and the duties confided to them by law. The law does not constitute them the judges, yet they may assume the responsibility of rendering a verdict contrary to the law as given to them in charge by the Court, and if they do so in a criminal case, and acquit the prisoner, their verdict is conclusive, for it is not under the control of the Court. This power however, that they may exercise upon their own responsibility, does not constitute them judges of the law in a legal sense, but on the contrary in a legal point of view, they

* This case has been lately affirmed in *Sweeny* vs. *The State*, 35 *Arkansas*, 601.

violate the law in rendering a verdict contrary to the rules laid down to them by the Court.

As the jury are not in legal contemplation judges of the law, it cannot be said that they have the legal right to disregard the instructions of the Court. They may assume to do so, but this assumption of power on their part cannot alter the law, or constitute them judges. The Court therefore did not err in refusing to give the charge requested by the defendant, for that charge assumes that the jury had the legal right according to law, to disregard the instructions of the Court. This right they have not. They can only assume to exercise it, if they will, upon their own responsibility."

In *Robbins* vs. *The State*, 8 *Ohio*, (*N. S.*,) 166, 167, Chief Justice BARTLEY, expressed the opinion of the Supreme Court of Ohio, as follows: "It is insisted, that the Common Pleas erred in the following instruction, to wit: 'It is the duty of the jury to receive the law, as it is given to them by the Court; it is the exclusive province of the Court to determine what the law is; and the jury have no right to hold the law to be otherwise in any particular, than as given to them by the Court.' There was no error in this instruction to the jury. By the expression '*the jury have no right to hold the law to be otherwise in any particular,' etc.*, is of course to be understood not the *arbitrary power*, but the *right* of the jury in the conscientious and proper discharge of their duty. It is made the peculiar province of the Court to decide the questions of law, and that of the jury to decide the questions of fact, under the instructions of the Court, as to the law of the case.

* * * * * * "It is the duty of the jury therefore to regard the law as determined by the Court; and this duty is required by the obligations of the juror's oath. And *in the proper and conscientious discharge of their duty*, a jury cannot, or in other words has no right to determine that the Court has erred in its instructions as to the law, and therefore to disregard the law as laid down to them by the Court. This is in accordance with the rule prescribed in *Montgomery* vs. *The State*, 11 *Ohio*, 424, and as settled by the great weight of authority, both in the Federal and State Courts."

Article I, section 19, * of the Constitution of Indiana, has given rise to some exceptional decisions in that State.

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*"In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

In *Keiser's Case*, 83 *Indiana*, 235, the Court below instructed the jury that the decisions of the Supreme Court of Indiana were law, until overruled, and that they could not be disregarded by the jury. That it was their duty to decide, to determine what the Supreme Court had decided, and be governed thereby. But this charge was held to be erroneous, and a new trial was awarded. This case was decided at the May Term, 1882.

At the November Term in the same year, *Fowler* vs. *The State* came up on appeal. It is reported in 85 *Indiana*, 539. The jury had been instructed that "the decisions of the Supreme Court read to you by the defendant are not binding upon you, but you may disregard them, and determine yourselves what the law is."

Judge ELLIOTT, who delivered the opinion of the court, after disposing of the other questions involved, refers to this charge as follows: "On the authority of *Keiser* v. *State*, 83 *Ind.* 234, this instruction must be held correct. From the conclusion reached in that case the writer dissented, and adheres to his dissent. It seems to the writer that the decision in the case cited, is wrong for these reasons:

1st. Regarding the decisions of the highest Court of the State, as mere evidence of the law, they are conclusive evidence binding upon Courts and juries alike.

2nd. Decisions of the Supreme Court bind the trial Court, and what binds the trial Court necessarily binds the jury, which is, in legal contemplation a part of the Court, using of course, the term Court, as meaning a tribunal where justice is judicially administered.

3rd. Law is the rule declared by the Statutes or established by the decisions of the Supreme judicial tribunals, and the Constitution, in speaking of law, means the rule thus established and declared, and not the judgments of individual jurors in particular cases.

4th. Law, as used in the Constitution, means a rule prevailing over the entire State, and not the notions of juries called to try criminal cases.

5th. Law, as used in that instrument, means a rule established by some competent authority; that authority is either judicial or legislative, and juries have not the semblance of any such authority.

6th. There is an ultimate source of law, and that is either in the judiciary or in the Legislature, and men who are called into the jury box, possess neither judicial nor legislative powers, and cannot be the source from which the law, using the term in the sense intended by the Constitution, is obtained." 85 *Indiana*, 541–2.

The judgment of the lower Court was however affirmed; and ZOLLERS, J. concurred in what was said by ELLIOTT, J., respecting the decision in *Keiser* vs. *State*.

The Revised Code of North Carolina, ch. 31, sec. 130, provides that "No Judge in delivering a charge to the petit jury shall give an opinion, whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a full and correct manner, the evidence given in the case, and declare and explain the law arising thereon." *See Code of* 1883, *sec.* 413.

The Supreme Court of North Carolina has decided in *Dunlap's Case*, 65 *North Carolina*, 293, that this Statute is *declaratory* of the common law. Dunlap had been convicted of murder and took an appeal. The Court below had explained the different grades of homicide to the jury, and instructed them that if they were satisfied from the evidence that the killing amounted only to manslaughter, they should acquit the defendant. The counsel for the prisoner contended that this form of instruction was not in full compliance with above Act. The Supreme Court held the point well taken, and awarded a new trial.

Judge RODMAN, who delivered the opinion said: "We concur with the counsel for the prisoner in his view of the charge of the Judge; we think it did not give that distinct and plain response to the questions raised, which the Statute requires. *On this point the Statute is only declaratory of the common law.* It is impossible to frame any general formula, which can supersede the distinct application of the law to the particular alleged state of facts, or dispense on the part of the Judge with the active exercise of his intelligence. This duty is the *special* duty of a Judge; for this mainly, is he required to possess ability and learning, and to evade or slight it, is to renounce the most difficult, but also the most useful and honorable duty of his office. All lawyers know that to eliminate facts, to put those which are material in their proper order, and to apply the law to them as a whole, taxes many times the strongest intellect, and always requires an amount of learning and practised ability, which a jury is not supposed to possess and which it is evident they cannot acquire through the hearing of any general dissertation on the law, however clearly it may be expressed. For these reasons we think the prisoner entitled to a new trial."

The case of *State* vs. *Buckley*, was decided in Connecticut in 1873.

A local statute provides, that "the Court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict." In above case, the Supreme Court of Connecticut thus unanimously construed this Act. 40 *Conn.* 248, 249.

"This statute makes the jury the judges of the law, but not in the sense in which it is sometimes claimed. They are not the judges of the law in such a sense that they are at liberty to disregard it, nor are they in any case at liberty to set aside the law and substitute for it something else, which suits their prejudices or caprices better. Neither are they at liberty, if the law applicable to the case does not meet their approval, to make law for the occasion. But they are to inquire what the law is; and when their judgment is satisfied, the law as thus ascertained is binding upon them, and should be their guide, whether it is or is not, as they think it ought to be. The jury were well told, that they were the judges of the law under the same obligations that attach to the judge on the Bench. 'No one is wiser than the law,' and we may add that no jury, however capable and intelligent they may be, are wiser than the law.

The judge and jury, and all concerned in the administration of justice, are equally bound by the law. In that way, and that alone, can persons and property be reasonably protected. In that way, and that alone, will justice be impartially administered. Any other theory if practically carried out, will sap the foundations of the Government, and render uncertain and capricious the administration of criminal law. A guilty man will escape through the sympathies of the jury, while the innocent will be convicted by reason of their prejudices; and what governs one panel as law, will be repudiated by another."

In Kansas, it has been held in *State* vs. *Bowen*, 16 *Kansas*, 475, that questions of law are exclusively for the Court to determine.

In Illinois, the subject under consideration is regulated by statute. * In the case of *Falk* vs. *The People*, 42 *Illinois*, 335, the traverser had been indicted for murder. The Court of Appeals said: "We think the jury should have been left to their own responsibility alone, to decide on the guilt or innocence of the pris-

* Section 188 of the Criminal Code of Illinois, (Rev. Statutes of 1880, section 431, page 414,) provides, that "juries in all criminal cases, shall be judges of the law and the fact."

oner, giving him the benefit of all reasonable doubts without any reference to the possible future action of the Court. Since the *statute makes the jury, the judges of the law and the fact*, they must discharge themselves of this responsibility on due deliberation, and as though their decision was final. The rule on this point is fully stated in *Schnier* vs. *The People*, 23 *Ill.* 17. It is there said, 'if the jury can say upon their oaths that they know the law better than the Court does, they have a right to do so, but before assuming a responsibility so solemn, they should be sure that they are not acting from caprice or prejudice, that they are not controlled by their will or wishes, but by a deep and confident conviction that the Court is wrong and they are right. Before saying this upon their oaths, it is their duty to reflect whether from their habit of thought, their study and experience, they are better qualified to judge of the law than the Court. If under all these circumstances they are prepared to say the Court is wrong in its exposition of the law, *the statute has given them that right.*'"

The Code of Georgia, (1868, section 4552; 1873, section 4646,) provides, that "on every trial of a crime or offence contained in this Code, or for any crime or offence, the jury shall be judges of the law and the fact, and shall in every case, give a general verdict of 'guilty' or 'not guilty;' and on the acquittal of the defendant or prisoner, no new trial shall on any account be granted by the Court."

In *McDaniel, alias Hickey* vs. *Georgia*, 30 *Ga*, 856, the Supreme Court of that State made use of the following language: "The jury being constituted by the Code, the judges of the law as well as of the facts, in a criminal case, we re-affirm emphatically the doctrine laid down in *Keener* vs. *The State*, 18 *Ga.* 194; and this tribunal must be remodelled, or the law changed, before one jot or tittle of the principles there stated will be abated; and that is, that while it is the duty of the jury to listen with that respect which is so eminently proper, to the law as expounded by the Court, and to adopt it provided they can conscientiously do so, still, if after all this, it is their *misfortnne* to differ conscientiously from the Court, it is not only their right, but their duty to find a verdict according to the opinion which *they* entertain of the law."

These two decisions tend strongly to sustain the negative of the question under discussion. In spite of the statutory powers conferred upon the jury, the Illinois Court lays down the rule, that in order to exercise the same, the jury must be better qualified to judge of the law than the Court, a state of affairs which the language of this *dictum* seems to admit, never is the case. In the

second place, in Georgia, the honest dissent from the opinion of the Court, authorized as it is by the Code, is regarded as a "misfortune" by the Appellate Court.

The statute above referred to, has been before the Supreme Court of Illinois on several occasions. In *Schnier* vs. *The People*, 23 *Illinois*, tried in 1859, the Court below refused to give the following instruction to the jury:

"You are the judges of the law and the facts of this case, and you are not bound by the opinion of the Court, as to what the law is." Such refusal was held to be erroneous, and the conviction was reversed, Judge WALKER saying: "This instruction, a majority of the Court think, should have been given. They are of opinion, that if the statute means what it says, that the jury shall be the judges of the law as well as the fact, the last member of the instruction follows as a necessary conclusion from the principle thus enacted."

It is interesting to note how this decision has been subsequently modified.

In *Fisher* v. *The People*, 23 *Illinois*, 295, the question came up again. Fisher had been convicted of murder, by a jury, who were instructed that they were bound by the opinion of the Court; that they must take the law as given them by the Court, as the law to govern them. Upon appeal, this charge was held to be erroneous; the Supreme Court, after citing above statute, said:

"This power is conferred in the most unqualified terms, and has no limits which we can assign to it. * * * * If they, (the jury,) can say *upon their oaths, that they know the law better than the Court, they have the power so to do.* If they are prepared to say the law is different from what it is declared to be by the Court, they have a perfect legal right to say so, and find the verdict according to their own notions of the law. It is a matter between their consciences and their God, with which no power can interfere." Judge WALKER dissented.

In *Mullinix* vs. *The People*, reported in 76 *Illinois*, 211, the counsel for the accused had asked for an instruction as follows: "The Court instructs the jury, for the defence, that the jury are the sole judges of the law, as well as the facts in the case." To which the Court added: "But the jury are further instructed, that it is *the duty of the jury to accept and act upon the law as laid down to you by the Court*, unless you can say on your oaths, that you are better judges of the law than the Court; and if you can say upon your oaths, that you are better judges of the law than the Court, then you are at liberty to so act."

The Supreme Court held this charge to be no ground of error, and said. (76 *Illinois*, 215:) "So long as the statute remains as it now is, we regard such a modification to such an instruction as eminently just and proper." This decision has been recently cited and approved in *Davison* vs. *The People*, 90 *Illinois*, 232.

It is submitted that such rulings practically annul the statute.

The section of the Georgia Code above referred to, was construed in *Brown* vs. *Georgia*, 40 *Ga.*, 693, 695. Judge McCAY, who delivered the opinion, uses the following language:

"What is the meaning of that law of Georgia, which enacts that the jury are in criminal cases, the judges of the law, and the fact? Judge JOHNSON, in the case before us, informed the jury that this did *not* mean that they might do as they pleased, or that they might disregard the charge of the Court as to what was the law. He told them further that this language meant *principally* that they must give a general verdict of guilty or not guilty; that they could not give a special verdict, and *for this purpose*, they were the judges of the law and the fact.

We think the Judge was right. There has of late years gotten abroad, what, in our opinion, is a misapprehension of the powers and duties of juries in criminal cases. * * * * Indeed, so far as we have looked into the cases in this State, there is no foundation for the extraordinary notion which has obtained so much currency, that the jury in criminal cases had no certain and binding guide to which they were to look for the law of the cases, but were left under their solemn oaths to grope about and find their way according to their own notions. It seems to us, that this is *neither law nor reason*, that it *makes a mere sham of the Court*, and is cruel and unjust to the jury." This *dictum* has since been repeatedly cited and approved. 41 *Georgia*, 217; 49 *Ibid*, 485; 52 *Ibid*, 82, 290, 607; 56 *Ibid*, 65.

In *Habersham* v. *The State*, 56 *Georgia*, 65, the Court said:

"The now current holding is, in effect, that to the jury the highest and best evidence of what the law is, is the charge of the Court; indeed, that their only final access to the law is through this charge."

In the case of the *Commonwealth* vs. *Antheis*, Chief Justice SHAW delivered the opinion of the Supreme Court of Massachusetts, to the following effect: (5 *Gray*, 198, 200.)

"In my judgment the true glory and excellence of the trial by jury is this; that the power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a

body well qualified by a suitable course of training to decide all questions of law; and another body well qualified for the duty, is charged with deciding all questions of fact, definitively; and whilst each within its own sphere performs the duty entrusted to it, such a trial affords the best possible security for a safe administration of justice and the security of public and private rights.

Nor do we consider that *this great fundamental principle of the common law* respecting jury trial, which gives to this department of jurisprudence that symmetry, consistency and perfection, by which it commands the favor and admiration of all friends of free institutions, and of civil liberty secured by law, is controlled or limited in its just and legitimate operation by the acknowledged rule, that in all criminal prosecutions, the jury have the power of deciding, that is of embracing and declaring the law as well as the fact by a general verdict. This results from a few well established rules of law and practice, incident to the trial of a criminal case.

* * * * * The law presumes that every man will do his duty, more especially every man invested with a high power in the administration of justice; it will presume that both Judges and jurors have done their duty. If they have, and it is within the province of the jury to adjudicate on the question of fact, and of the Judge to adjudicate on the question of law, the general verdict of guilty or not guilty, is as full and complete an answer to the compound question of law and fact, each adjudged by its appropriate organ, as the like conviction pronounced by the Judge after a special verdict."

VI.

AMERICAN AUTHORITIES.

FEDERAL DECISIONS.

IN the case of the *United States* vs. *Morris*, 1 *Curtis*, 53, decided in 1851 in the Circuit Court of the United States for the first Circuit, Judge CURTIS went into the question at considerable length, as follows:

"In my opinion then, it is the duty of the Court to decide every question of law, which arises in a criminal trial; if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it, than they would have had, if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, *and they are bound to consider that they are told truly;* that law they are to apply to the facts as they find them, and thus passing both on the law and the fact, they, from both, frame their general verdict of guilty or not guilty. Such is my view of the respective duties of the different parts of this tribunal, in the trial of criminal cases, and I have not found a single decision of any Court in England prior to the formation of the Constitution, which conflicts with it."

Referring to Fox's Libel Act, he said: "This seems to me to carry the clearest implication that in this and all other criminal cases, the jury may be *directed* by the Judge; and that, while the object of the Statute was to declare that there was other matter of fact besides publication and the innuendoes to be decided by the jury, it was not intended to interfere with the proper province of the Judge to decide all matters of law. That this is the received opinion in England, and that the general rule declared in *Rex* vs. *Dean of St. Asaph*, that juries cannot rightfully decide the law in criminal cases, is still the

law in England, may be seen by reference to the opinions of Baron PARKE in *Parmiter* vs. *Copeland*, 6 *M. & W.* 165, and of Chief Justice BEST, in *Levi* vs. *Milne*, 4 *Bing.* 195." 1 *Curtis*, 55.

The opinion, concludes as follows:

"A strong appeal has been made to the Court by one of the defendant's counsel, upon the ground that the exercise of this power (to decide the law) by juries, is important to the preservation of the rights and liberties of the citizen. If I thought so, I should pause long before I denied its existence. But a good deal of reflection has convinced me that the argument drawn from this quarter is really the other way. As long as the Judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them not only to public opinion, but to a Court of Impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But on the other hand, I do consider that this power and corresponding duty of the Court *authoritatively to declare the law, is one of the highest safeguards of the citizen.* The sole end of Courts of Justice is to enforce the laws uniformly and impartially without respect of persons or times, or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause, when a law, unpopular in some locality is to be enforced there, then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne." 1 *Curtis*, 62, 63.

In a criminal case, tried before Mr. Justice THOMPSON, in the United States Circuit Court in New York City, counsel for the accused requested the Court to instruct the jury that they were judges of the law and the fact. But he refused, and laconically said: "I sha'nt; they ain't." 3 *Wharton on Criminal Law*, *sec.* 3269.

In the case of *Stettinius* vs. *The United States*, 5 *Cranch C. C.* 583, 584, Chief Justice CRANCH of the United States Circuit Court of the District of Columbia, has placed himself on record, in accordance with the general preponderance of the authorities.

At the trial below, the attorneys for the accused objected to the Court's giving any instruction to the jury as to the law, and declined arguing the law to the Court, on the ground that they had the right to argue to the jury both upon the law and the evidence. The objection was overruled, and the jury were instructed in accordance with a prayer offered by the attorney for the United States. The traverser excepted, and took an appeal, but the decision was sustained.

CRANCH, C. J. in disposing of this point said:

"The objection to the Judge's giving any instruction to the jury as to the law, when the defendant's counsel declines arguing the law to the Court and insists upon arguing it to the jury, seems to be founded upon the idea that the jurors are the sole judges of the law, and are under no obligation to respect the decisions of the Judge upon the questions of law arising in a criminal cause. * * * * The right and the power of the jury to decide the law and the fact together by a general verdict upon the general issue, is *not greater in criminal causes, than in civil.* The effect only is different. In civil causes the Court will set aside the verdict, if against its opinion of the law, whether the verdict is against the defendant or the plaintiff; but in criminal causes, if the verdict be in favor of the defendant, inasmuch as the King might have a writ of attaint, and reverse the judgment; and as the prisoner is not to be put twice in jeopardy, nor to be twice vexed for the same offence, and as he could not have attaint if the verdict should be against him, the Courts have uniformly for more than two centuries refused to award a new trial, when the prisoner has been acquitted upon a general verdict of not guilty. This conclusive effect of a verdict of acquittal does not arise from the right of the jury to decide the law definitively in the case, because if the verdict of the jury had been against the defendant, contrary to law, or to the Court's exposition of the law, the Court unquestionably had the right and the power to set aside the verdict as being contrary to law, and to award a new trial. This could not be the case if the jury had the exclusive right to decide the law. If they had, the verdict would be as conclusive in the one case as in the other." 5 *Cranch C. C.* 585.

Bushel's case has already been cited. Chief Justice HALE has commented upon that decision in a manner, which indicated that in his opinion, juries are judges only of the fact, and not of the law. Chief Justice CRANCH in referring thereto, uses the following language:

"Blackstone in citing this passage from Hale has materially altered the language of the last clause of the last sentence. He says: 'For as Sir Matthew Hale well observes, it would be a most unhappy case for the Judge himself, if the prisoner's fate depended upon his directions. Unhappy also for the prisoner; for if the Judge's opinion must rule the verdict, the trial by jury would be useless,' *Hale says,* '*rule the matter of fact.*' Blackstone says, 'rule the verdict.' Hale speaks of the Judge's *controlling* the jury as to the fact only. Blackstone makes him speak of the Judge's *controlling* the jury generally as to their verdict, which may be in matter of law or matter of fact. This makes so great a difference in the case, that Hale's

language as cited by Blackstone has been used in support of the supposed exclusive right of the jury to decide the law in criminal cases, (1 *Erskine*, 160,) whereas the language of Lord HALE in his own book affords no such support, but evidently tends to support the contrary doctrine." 5 *Cranch C. C.* 590.

The case of *United States* vs. *Riley*, 5 *Blatchford C. C.* 205, came up in 1864; in the United States Court for the Southern District of New York. Counsel for the traverser asked for instructions to the effect that the jury, and not the Court were judges of the law in criminal cases. This charge was refused, and Riley having been convicted, his counsel moved for a new trial, assigning this refusal as one of the grounds for such motion. The conviction was sustained. Judge SHIPMAN, who delivered the opinion of the Court said:

"The second ground upon which a new trial is asked, is, that the Court refused to instruct the jury that they, and not the Court were judges of the law in criminal cases. This is no new question in the Courts of the United States. Whatever may have been the views of some of the Judges of those Courts, in the early days of the Republic, it is well understood, that the settled practice of those tribunals, has for many years been in accordance with that followed on this trial."

The case of *United States* vs. *Greathouse*, was tried in 1863 in the U. S. Circuit Court of the Tenth Circuit; District of California. Mr. Justice FIELD, of the Supreme Court of the United States presided, and charged the jury, as follows: (2 *Abbott U. S.*, 364, 370.)

"Gentlemen of the jury. Before proceeding to give any instructions in this case it may be proper to briefly call attention to your appropriate and only province in the determination of the issues presented. There prevails a very general *but an erroneous* opinion that in all criminal cases the jury are the judges as well of the law as of the fact,—that is, that they have a right to disregard the law as laid down by the Court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the Court, and in case of acquittal their decision will be final—for new trials are not granted in criminal cases where a verdict has passed in favor of the defendant; but *they have no right, legal or moral, to adopt their own views of the law.* It is their duty to take the law from the Court and apply it to the facts of the case. *It is the province of the Court, and of the Court alone to determine all questions of law arising in the progress of a trial;* and it is the province of the jury to pass upon the evidence, and determine all contested questions of fact. The responsibility of deciding cor-

rectly as to the law rests solely with the Court, and the responsibility of finding correctly the facts, rests solely with the jury.

The separation of the functions of the Court from those of the jury, in this respect is essential to the efficacy and safety of jury trials. Any other doctrine would lead only to confusion and uncertainty in the administration of justice."

That great American jurist, Judge STORY, has most clearly and emphatically expressed himself upon this important question.

In the case of *John Battiste*, 2 *Sumner*, 243, 244, tried for a capital offence in the Circuit Court of the United States, at Boston, in 1835, he instructed the jury as follows:

"Before I proceed to the merits of this case, I wish to say a few words upon a point suggested by the argument of the learned counsel * for the prisoner, upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact.

My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue.

In each of these cases their verdict, when general is necessarily compounded of law and fact; and includes both. In each, they must necessarily determine the law as well as the fact. In each, they have the physical power to disregard the law as laid down to them by the Court. But I deny, that in any case civil or criminal, they have the moral right to decide the law, according to their own notions or pleasure. *On the contrary I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the Court as to the law.* It is the duty of the Court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the Court. This is the right of every citizen and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the Court would not have any right to review the law, as it had been settled by the jury. Indeed it would be almost impracticable to ascertain what the law as settled by the jury actually was. On the contrary, if the Court should err, in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ

* Daniel Webster and C. P. Curtis.

of error as the nature of the jurisdiction of the particular Court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose from wantonness or ignorance, or accidental mistake to interpret it."

VII.

MARYLAND DECISIONS.

ARTICLE 15, Section 5, of our present Constitution, (1867,) has at various times been before the Court of Appeals of Maryland.

In the case of *Wheeler* vs. *The State*, 42 *Md.* 563–570, (decided in 1875,) after the evidence had been closed, and the case fully argued to the jury, and they had retired to consider of their verdict, and had been vainly endeavoring to agree for *sixteen hours*, they addressed a note to the Court, requesting to be informed, "whether the charge contained in the third count of the indictment must be confined to the first day of January, 1874," the particular time mentioned in that count. This communication was received in open Court, and was announced to the counsel both of the appellant and the State.

The Court prepared a response in writing to the effect that it was sufficient if the jury found the offence charged on the day mentioned, or at any other time between that day and the day of finding the presentment, that such was the opinion of the Court, *by which however the jury were not bound.* To the *sending* of this reply of the Court, the counsel for the appellant objected, and insisted that if any instructions were given to the jury at that stage of the case, the jury should be brought into open Court, and there be instructed by the Court on the law of the case, on such prayers as counsel on either side might submit; and he notified the Court that the appellant desired the jury to be instructed in accordance with a prayer which was then read, and which is set out in the record. The Court below declined to have the jury brought from their room, but sent its written response aforesaid to them, by the bailiff—whereupon appellant took an exception.

This case being the first in which this question arose in this State, is worthy of attention. It must be noted that counsel for the accused in effect *conceded* the right of the Court to instruct the jury. The decision was affirmed.

Judge ALVEY, who delivered the opinion, said: (42 *Md.* 569, 570.)

"In the course pursued by the Court, we can perceive no manner of objection whatever. It was certainly within the power, if not the duty of the Court to respond to the inquiry of the jury, and as it is not pretended that that response stated anything inconsistent with law, or that it was in the least manner calculated to mislead the jury in their finding, we are at a loss to understand upon what principle this Court can be expected to reverse the ruling of the Court below, unless it be that the jury should have been brought into Court to receive the response to their inquiry. But why bring in the jury to receive such a response? It would have been but an empty form, unless it be true as contended by the counsel for the appellant, that it was his right to have the jury fully instructed upon the law of the case. But this Court entertains no such opinion as that. The case had been fully argued before the jury, both upon the law and the facts, and had been submitted to the jury for their consideration and decision. The time had therefore past when the parties could rightfully apply to the Court for instruction as to the law of the case. The jury are made the *judges* of law as well as of fact, in the trial of criminal cases, under the Constitution of this State; and any instruction given by the Court as to the law of the *crime*, is but advisory, and in no manner binding upon the jury, except in regard to questions as to what shall be considered as evidence. Whether the Court is bound to instruct the jury in criminal cases, upon the application of the parties, or either of them, or at what stage of the trial instructions should be given, if given at all,—whether before or after the argument of the case by counsel to the jury—or whether the *refusal* of the Court to give instructions at the instance of either party, be the subject of an exception; are questions that we are not now called upon to decide, and in regard to them, we intimate no opinion. But as to the action of the Court below, in refusing to have the jury brought into Court, and declining under the circumstances of the case, to entertain the proposition to instruct the jury as desired by the appellant, we think there can be no question; and that such action of the Court afforded no ground of exception, under the Act of 1872, ch. 316."*

* This Act provides, that "in all trials upon any indictment or presentment in any Court of this State having criminal jurisdiction, it shall be lawful for any party accused, or for the State's Attorney in behalf of the State of Maryland to except to any ruling or determination of the Court, and to tender to the Court a bill of exceptions, which shall be signed and sealed by the Court as is now practised within this State in civil cases; and the party tendering such bill of exceptions, may appeal from such ruling or determination to the Court of Appeals;

The next case is *Broll* vs. *The State*, 45 *Md.* 359, decided in 1876. I give the opinion of the Court *verbatim:*

"The record in this case shows that the appellant was indicted in the Circuit Court for Anne Arundel County, for a violation of the second section of the Act of 1874, chap. 181—Title 'Oysters.' In the bill of exceptions set out in the record is a memorandum as follows:—'general demurrer filed; joinder in demurrer; demurrer overruled; leave granted to plead.' From this it would appear that there was a demurrer to the indictment. The record however does not set out the demurrer, and therefore it is not properly before us for review. *Wheeler* vs. *The State*, 42 *Md.* 565. We have however carefully examined the indictment and the Act of Assembly under which the appellant is indicted, and are satisfied that the indictment is sufficient.

The appellant after the close of the evidence, asked the Court to instruct the jury that if they should find that the appellant was not the owner of the pungy, 'James Bulack,' at the time named in the indictment, then he was not answerable, and should not be convicted on the fifth and sixth counts of the indictment. The other counts had been abandoned by the State. The Circuit Court refused to grant the instruction, giving in writing as its reason therefor, that 'the jury being by the Constitution, judges of the law of criminal cases tried by them, the Court declines to instruct them in this case.' Art. 15, sec. 5, of the Constitution of 1867, provides that 'in the trial of all criminal cases, the jury shall be the judges of law, as well as of fact.' The jury then, being judges of law as well as of fact in criminal cases, would not be bound by any instructions given by the Court, but would be at perfect liberty to utterly disregard them, and find a verdict in direct opposition to them. No Court in this State can be *required* by the counsel or jury, to give instructions either upon the law or the legal effect of the evidence, given at the trial. This seems to have been the opinion of this Court held in the case of *Franklin* vs. *The State*, 12 *Md.* 246, 249. The Court *may* in its discretion, advise the jury as to the law and legal effect of the evidence, but is not bound to do so, and being a matter entirely within its discretion, its refusal to do so cannot be reviewed by this Court, even if this case is now properly before us upon this appeal.

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provided that the counsel for the accused shall make oath that such appeal is not taken for delay; and such appeal shall be heard by the Court of Appeals at the earliest convenient day after the same shall have been transmitted to the said Court; and after such appeal shall be entered, no judgment shall be rendered against the accused in case he shall be found guilty, until the Court of Appeals shall have determined upon the exception, and remand the case to the Court below."

It seems to have been supposed that the Act of 1872, ch. 316, which authorizes exceptions to be taken in criminal cases, also authorizes exceptions such as the one presented in this record. That Act can only apply to such rulings as the Court may be called upon to make with regard to the admissibility of evidence during the trial. It is impossible that the Legislature contemplated giving the right to parties in criminal cases to have instructions upon the law *and the legal effect of the evidence*, and exceptions to such rulings, in the face of the constitutional provision under which *juries are at liberty to treat such instructions with utter disregard, and to find their verdict in direct opposition to them.*"

The next case in chronological order is *Bloomer* vs. *The State*, 48 *Md.* 521. The accused had been indicted for conspiracy. At the trial below, the entire testimony having been offered and received by the Court, subject to exception reserved by the accused, as to its legal sufficiency and admissibility, and subject to the right reserved, to move the Court to exclude it from the jury, counsel for Bloomer in pursuance of said exception, and in exercise of the right so reserved, submitted three several motions, for the purpose of excluding from the jury all the evidence in the case, upon which the State relied to support the three counts of the indictment: "Because they say, that the said evidence is not sufficient in law to support said counts, or either of them."

These motions were overruled, and the accused having been convicted took an appeal. The decision was affirmed. The Appellate Court said: "These motions are equivalent to a demurrer to the evidence, by which the Court is called on to declare what the law is upon the facts shown in evidence, analogous to a demurrer upon facts alleged in pleading. 2 *Stephen's N. P.* 179; *Copeland* vs. *New England Ins. Co.* 22 *Pick.* 135. It is urged on behalf of the State, that these motions infringe the injunction contained in the 5th section of Art. 15, of the Constitution of this State, which declares that 'in the trial of all criminal cases, the jury shall be the judges of law as well as of fact.'

This question was incidentally presented to this Court in the case of *Wheeler* vs. *The State*, 42 *Md.* 569. * * * * Commenting on the exception to the act of the Court below, this Court said: 'The jury are made the judges of law, as well as of fact, in the trial of criminal cases, under the Constitution of this State; and any instruction given by the Court, as to the law of the *crime*, is but advisory, and in no manner binding upon the jury, except as to questions as to what shall be considered evidence.' More recently the question was presented directly, in the case of *Broll* vs. *The State*, 45 *Md.*

359. * * * * This Court, affirming that decision upon appeal, add: 'The jury then being judges of law as well as of fact in criminal cases, would not be bound by any instructions given by the Court, but would be at perfect liberty to utterly disregard them, and find a verdict in direct opposition to them. No Court in this State can be *required* by the counsel or jury to give instructions either upon the law, or *the legal effect of the evidence* given at the trial.'

The motions of the appellant (in present case,) *require the Court to pronounce and decide upon the legal effect of the evidence.*

They affirm the evidence should be excluded from the jury, because it is not sufficient in law to support such counts. These motions are not based upon the inadmissibility of the evidence, its want of relevancy, or continuity, the absence or omission of any particular fact necessary to complete the chain, but they propose to the Court to say virtually, the traversers shall be discharged without day, and the jury withdrawn.

If the Court had the power, there is no legal standard to which they could appeal to reach such a conclusion.

Conspiracy is a mixed question of law and fact, a deduction to be drawn from an infinite number of particulars, which the jury alone are competent to make, and when there was a *prima facie* case, it was the duty of the Court to leave it to the jury to say, whether the evidence was sufficient in law and in fact to prove the offence charged. Finding no error in the several rulings of the Court below, the same will be affirmed." 48 *Md.* 538, 540.

In the case of *Forwood* vs. *The State*, 49 *Md.* 537, the jury again demonstrated the fact that juries generally, are unable to decide the law, and asked the Court for instructions, which request was complied with. Counsel for traverser, excepted, and the accused having been convicted took an appeal.

The Court of Appeals said: "These instructions were given at the request of the jury, who were at the same time instructed that in criminal cases, they being judges of the law and of the facts, they were not bound by any instructions of the Court, but were only to give such instructions such weight as in their judgment they saw proper.

It was within the discretion of the Court to give instructions to the jury, though we have said they were not obliged to do so. *Wheeler* vs. *State*, 42 *Md.* 569; *Broll* vs. *The State*, 45 *Md.* 359.

It has been contended by the Attorney-General, that instructions so given are not "*rulings*" within the meaning of the Act of 1872, ch. 316, subject to be reviewed upon appeal. It is not necessary to express any opinion on that point in this case; because in our judg-

ment the instructions given to the jury were correct; they are in accordance with the views we have expressed in disposing of the *first* and *second* bills of exceptions; and even if they were properly before us for review, there would be no ground for reversal." 49 *Md.* 537, 538. *

Broll vs. *The State* and *Bloomer* vs. *The State* seem to hold, that in criminal cases, the law, *and the legal effect* of the evidence, are questions for the jury to decide. *Franklin's Case*, 12 *Md.* 244, 249, is cited as the original authority for this proposition.†

The legal effect of the evidence adduced in a cause, is undoubtedly a question of law, and when the Court of Appeals said, that "no Court in this State, *can be required* by the counsel or jury to give instructions either upon the law, *or the legal effect of the evidence* given at the trial," (*Broll* vs. *The State*, 45 *Md.*, 360; *Bloomer* vs. *The State*, 48 *Md.* 539,) they practically decided, that the law of a criminal case, and the legal effect of the evidence offered therein, are questions of which the jury are the absolute judges; while the Court *may*, in its discretion, instruct the jury upon these points, such directions are not binding, and may be disregarded by them.

Furthermore in the case of *World* vs. *The State*, 50 *Md.* 55, where the record of a previous conviction of the accused had gone in as evidence, the Court of Appeals said: "While the record of conviction was not of itself legally sufficient to convict, it was a link in the chain of evidence admissible *per se*, when offered, as tending to prove the issue. *Its legal effect was a question for the jury to determine*, they being under our Constitution, the judges of the *law* and the *facts* in criminal cases."

It is submitted that the decision in *Bell, alias Kimball* vs. *The State*, 57 *Md.* 108, reverses this doctrine, and makes the Court, and

* In the late case of *Swann* vs. *State*, (December 18, 1885,) the Court of Appeals of Maryland said:

"It has never been decided, however, that if the Court should in the exercise of its discretion instruct the jury, and should instruct them erroneously, and the jury should follow the instructions to the plain injury of the accused, in such case no just ground of reversal would exist upon exception taken to such ruling. In *Forwood's Case*, 49 *Md.* 537, the point was made that such ruling was not reviewable; but the Court declined to pass on the question because it was unnecessary, as in their judgment, the instruction was proper and the prisoner suffered no injury. Although this Court has said that, the jury being judges of both law and fact, the Court is not bound to instruct if asked, and that refusal to instruct is no ground of appeal, yet we are clearly of the opinion that if the Court does instruct the jury, and does so *erroneously*, and exception is taken and the jury have manifestly followed that instruction to the plain injury of the prisoner, he is entitled to have the injury remedied on appeal." 1 *Atlantic Reporter*, *No.* 14, *p.* 872–873.

† *Broll* vs. *The State* 45 *Md.* 360.

not the jury, pass upon the legal effect of the evidence adduced in a criminal trial.

This case was appealed from the Circuit Court for Howard County where *Bell, alias Kimball,* had been convicted of forging a check dated *July* 16, 1880. (He had previously been tried in Baltimore City, upon the charge of uttering a forged check dated *July* 17, 1880, and *acquitted.*)

Two exceptions were reserved. The first arose out of the fact, that the Court below decided, that in the pending trial, it was competent to the State for the purpose of proving guilty knowledge, to how that the prisoner at, or about the same time had uttered other forged checks, and that the State was not precluded from offering such testimony, by the fact that the prisoner had been indicted, tried and acquitted of forging and uttering such other forged paper; and they were also of opinion, that they (the Court) could not receive the oral testimony offered by the prisoner's counsel, as to the ground upon which said former case was tried and argued, and the verdict of acquittal rendered, but were of opinion, that it would be competent for the prisoner, and they would allow his counsel to offer in evidence in his defence, the record of his acquittal in the former case, *but for the purpose only of affecting the weight and credibility of the evidence of identity,* that may be produced against him on his present trial, and the *weight of other evidence* that may be produced tending to show him to be guilty of the crime for which he is now indicted and under trial. Having expressed this opinion, after the question had been fully argued by counsel on both sides, the Court overruled the objection of the prisoner's counsel, and held:

"*First.* That it was competent for the State to give in evidence the conversation between the witness *Morris,* (the bank teller) and the party who presented the second check on the 17th of July, and what took place on that occasion in the bank, and in the presence of said witness, in reference to its presentation and payment, irrespective of the question whether the prisoner, had been acquitted of forging and uttering that check or not.

Second. That it was also competent for the State on this trial to offer evidence tending to show that said second check was a forgery, and was presented to the witness *Morris* for payment on the 17th of July, by the prisoner, and that he was paid the money therefor by said witness, notwithstanding the prisoner had been tried and acquitted of forging and uttering that check.

Third. That the Court would not in determining the question of the admissibility of the evidence, mentioned in either the said first or second rulings, receive or consider the said oral testimony offered by the prisoner's counsel, as to the ground upon which the said case in

the Criminal Court was tried and argued, and the verdict of acquittal rendered, and refused to receive and consider the same."

To these rulings counsel for the traverser reserved the first exception.

The second exception was taken under the following circumstances. The appellant, by his counsel, under permission of the Court as stated in the first exception, offered in evidence the record of acquittal of *George Bell, alias George W. Kimball,* on an indictment in the Criminal Court of Baltimore City, for forging and uttering the check of the 17th of July, 1880, and then closed. In arguing the case before the jury, the counsel for the appellant contended that the record of acquittal was *conclusive* of the case then on trial, that it was conclusive of the fact that the appellant was not the party who passed, uttered or forged the check of July 17th,—that the State was estopped by such acquittal from contending in this case, that such was not the law; and that the jury being the judges of the law, as well as of fact in criminal cases, they had the right and were bound to receive and regard said record of acquittal as thus conclusive, and the State as thus estopped. The Court, upon objection being made to such argument, interposed and refused to permit the counsel for the appellant so to argue, upon the ground that they had expressly decided as stated in the first exception, that it was competent for the State on this trial to prove that said second check was a forgery, and was passed and uttered by the prisoner, and that said record of acquittal was not admitted in evidence, nor allowed to go to the jury for the purpose of having any such conclusive effect, but only for the purpose of affecting the weight or credibility of the evidence against the prisoner.

To the Court's refusal to permit the counsel of the traverser to so argue to the jury, the second exception was taken.

The above rulings were affirmed, and the conviction sustained. The Court of Appeals in disposing of the second exception made use of the following language: "The Court below was perfectly right, either upon the suggestion of the State's attorney, or *sua sponte*, in interposing and preventing the appellant's counsel from making such an argument to the jury.

The Court had stated in delivering its opinion in the first exception, that it would not receive the oral proof offered by the appellant, but would thereafter admit the record of acquittal in evidence, for the purpose of affecting the *weight* and *credibility* of the evidence against him. At the time that record was offered, the counsel might, if they had thought proper, have offered it generally, or as

conclusive evidence, that the appellant had not forged or uttered the check of July 17th, and as an estoppel upon the State, and if rejected by the Court when thus offered, or admitted for the purpose only of affecting the weight and credibility of the evidence against him, the appellant might have then excepted to such ruling and had it reviewed by this Court. But it was not so offered. On the contrary, it was offered expressly on the terms and for the purpose, which the Court had stated it would be admissible for; that is, for the purpose of affecting the *weight* and *credibility* of the evidence, against the accused. And even when the Court interposed and stated the purposes for which alone the record had been admitted, the appellant might have excepted to the ruling, limiting the effect of the record to this particular purpose, if it had not been offered '*under the permission of the Court as stated in the first exception.*' *Sauerwein* vs. *Jones*, 7 *G. & J.* 341; *Inloes* vs. *American Exchange Bank*, 11 *Md.* 185. But he excepted, not to the limitation thus put upon the effect of the record as evidence, but to the Court's *refusal to permit his counsel to argue* that the record had a larger and broader effect, than that to which it had been limited by the Court. *The Court has an undoubted right to state to the jury, the legal effect of evidence, which has been introduced and submitted to their consideration. McHenry* vs. *Marr & Emmart*, 39 *Md.* 532, 533; *Wheeler* vs. *The State*, 42 *Md.* 570.

Not having excepted to the statement made by the Court of the legal effect of the record, it became the law of the case. *Hogan* vs. *Hendry*, 18 *Md.* 128; *Davis* vs. *Patton*, 19 *Md.* 128; *Dent* vs. *Hancock*, 5 *Gill*, 127. Being the law of the case, counsel were not at liberty to argue against it. *Sauerwein* vs. *Jones*, 7 *G. & J.* 341. It is true that Art. 15, section 5, of the Constitution declares, that 'In the trial of all criminal cases, the jury shall be the judges of law as well as of fact,' but this Court has said that 'the words in the Constitution have no greater signification since their incorporation into the organic law, than they had previously.' *Franklin* vs. *State*, 12 *Md.* 286. *This Court has also decided that the Court has a right to instruct the jury in a criminal case, as to the legal effect of evidence. Wheeler* vs. *State*, 42 *Md.* 570; and having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction. If a jury should disregard an instruction in a criminal case, and convict, the evil can be remedied by granting a new trial. But if they should acquit in disregard of it, there seems to be no remedy. But whatever powers the Constitution may have conferred upon juries in criminal cases, it has conferred none upon *counsel.* They are still officers of the Court, and under its proper control, and if the Court expresses an opinion on a question of law, upon which it

has a right to express it, and a party considers himself aggrieved by it, he has his remedy either by petition in the nature of a writ of error, or by a bill of exception. But counsel have no right, and ought not to be permitted to argue against it before the jury, in order to induce them to disregard it. But even *if the effect of the record of acquittal was properly presented by this exception*, we would have to say, as we have said in treating the first exception, *that it was admissible for no other purpose than for the purpose of affecting the weight of the evidence against the accused.*" *Bell, alias Kimball* vs. *The State*, 57 *Md.* 119–121.

This decision establishes the proposition, that the Court has the right in criminal cases, to instruct the jury as to the legal effect of the evidence submitted to their consideration. *Broll* vs. *The State*, *Bloomer* vs. *The State*, and *World* vs. *The State*, are not referred to. Two cases are cited as authorities to support this ruling; the first, is a civil proceeding, and the other, is *Wheeler* vs. *The State*. In the latter, the Court of Appeals as previously noticed, said: "The jury are made the *judges* of law as well as of fact in the trial of criminal cases, under the Constitution of this State; and any instruction given by the Court as to the law of the *crime*, is but advisory, and in no manner binding upon the jury, except in regard to questions as to *what shall be considered as evidence.*" This *dictum* it seems, only alludes to the *admissibility* of evidence, and is referred to in *Bloomer's Case*, where the Court of Appeals refused to pass upon the *legal effect* of the evidence, as an authority for such refusal.

It is submitted, that *Wheeler's Case* does not sustain the proposition laid down in *Bell* vs. *State*, as aforesaid, and that if it did go to such a length, it had been overruled by the decisions in *Broll* vs. *The State*, *Bloomer* vs. *The State*, and *World* vs. *The State*.

In *Bell's Case*, the Court said alluding to the prisoner's counsel, that, "not having excepted to the statement made by the Court, of the legal effect of the record, it became the law of the case." This is unquestionably the rule in civil proceedings, but it would seem that Art. 15, sec. 5, of the present Constitution, is very broad in its scope, and comprehensive in its terms; and it is not within the letter or spirit of its provisions, that the right of juries to decide the law, as therein conferred, shall be affected or qualified by the acts or omissions of attorneys engaged in the cause. The argument that the words in the Constitution are merely declaratory of the common law, and have not changed the pre-existing practice, cannot apply in this instance, because the right to reserve exceptions to the rulings of the Court in

criminal cases, did not exist at common law,* and was not granted by the Maryland Legislature until 1872.

Bell vs. *The State*, in this particular, practically overrules the preceding decisions above mentioned. This encroachment upon the constitutional power of the jury, as expounded in those cases, is certainly in accordance with reason, and the weight of authority elsewhere, yet it cannot readily be reconciled with the doctrine, that juries in criminal cases shall be the judges of the law.

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* In the early colonial days of Maryland, bills of exceptions were allowed in criminal cases, by the Act establishing Assise Courts in the Province.—*The Lord Proprietary* vs. *King*, 1 *H. & McH.* 83, (*A. D.* 1732,) *Note.*

In *Queen* vs. *The State*, 5 *H. & J.* 233, it was held in 1821, that "a bill of exceptions is not allowed in criminal cases, no such privilege was given by the common law, and the Statute of Westminster does not embrace it."

VIII.

CONCLUSION.

Hon. DECIUS S. WADE, Chief Justice of Montana, in an Article published in the *Criminal Law Magazine*, (1882,) vol. III, 491, 497, 498, expresses himself as follows, in discussing the right of juries in criminal cases to decide the law:

"This theory is an anomaly. It is at variance with the maxim that reason is the soul of the law. It is out of joint with common sense and common reason. It destroys the value of precedents, which are the life of the law, and by means of which, progress in legal principles is insured.

It stultifies the universal practice of mankind in other things. The man learned in his trade or profession, speaks with authority. His opinions are entitled to respect. We act upon them in the highest and gravest concerns of life.

The structure of the common law is built upon precedents; hence its steadiness, uniformity and certainty. It makes the law supreme and requires obedience alike from all. It creates a government of law, and secures liberty by compelling obedience. It permits the exercise of no arbitrary power. It aims at uniformity and certainty in judicial decisions. * * * * * *

The end of all good governments is the honest and uniform administration of good laws. Safety comes to the people, and life, liberty, and property are secure, when no one can be deprived thereof except by 'due process of law,' and when in the adjudication of public and private rights, judicial authority speaks the pure voice of the law, 'the law of the land.' The doctrine that jurors are judges of the law in criminal cases, abolishes the sacred 'law of the land,' which since the days of King John and *Magna Charta*, has been the birth-right of all English speaking people, and tends to the exercise of irresponsible arbitrary power. They are judges, whose decisions cannot be reviewed. Their decrees are irrevocable and final. If they set aside a constitution or a statute, their act cannot be questioned.

If in the jury room, they legislate and enact a law for the case in hand, it never sees the light of day; it is a mystery and a myth; no one can lay his hands upon it; no one can construe or interpret it; it affords no guide for the future, for it vanishes into nonentity the moment the verdict is returned, and the verdict makes no sign; the decision and the Judges quickly disappear.

* * * * * * * * * * * * *

The spirit of the maxim, that it is for the Court to declare the law, and for the jury to find the facts, and that neither can rightfully encroach upon the province of the other, pervades the structure of the common law, and within those jurisdictions where the question is not affected by Constitution or statute, this maxim affords the only safe guide to a proper and uniform administration of justice."

It is worthy of comment, that even in those States, where juries are empowered to decide the law, they are prohibited from taking law books with them, when they retire to deliberate and make up their verdict. Strange inconsistency! They are made sole arbiters of the law, and yet are not permitted to consult the authorities, are refused access to the sources from which all legal knowledge is derived, and not allowed to look into the statute book where the laws of the State are printed. This is a common law rule, and its origin may be traced to the fact, that juries were bound to abide by and follow the instructions of the Court, and had nothing whatever to do with the books. This prohibition is rigidly enforced in Maryland and Indiana, in spite of the constitutional provisions making juries in criminal cases, the judges of the law.

In *Newkirk* vs. *The State*, 27 *Indiana*, 1, the jury after retiring, requested the bailiff to bring them the book, which had been read to them during the trial of the cause. The volume referred to, was *Bishop on Criminal Law*, and the request was complied with. The Supreme Court of Indiana held, that this was *misconduct on the part of the officer and the jury, tending to prevent a fair and due consideration of the cause*, and awarded a new trial.

It seems singular, that it should be *misconduct* upon the part of the "*Judges*" of the law, to consult those authorities from which Court and counsel derive their legal knowledge.

That twelve civilians,—some of whom have never opened a legal treatise, and others are perhaps in a Court of Justice for the first time in their lives,—should have the absolute power to decide the law, is certainly an anomaly.

If a lawyer were called in to diagnose a disease, and had never consulted a medical work, never attended a lecture, was totally igno-

rant of all symptoms,—who derives his sole information from two contending physicians, who contradict each other in their accounts of what the complaint actually is,—the attorney would be in great perplexity, and the poor patient, for whom he prescribes under such circumstances, is deserving of all sympathy.

The attorney is in the position, in which the conscientious juryman very often finds himself, when he undertakes to pass upon the law. It may be said, that this comparison does not hold good, because in cases of doubt, the jury may be instructed by the Court, but every time juries ask for instructions, they admit their inability to decide the law, and thus sustain our contention.

In conclusion it is submitted, that the clause of the Maryland Constitution above considered, is a standing reflection upon the judiciary of the State. It conveys the inference, that our Courts cannot be trusted; it is contrary to reason; opposed to authority; and should be expunged from the law of the land.

CORRIGENDA.

Page 20—Sixth and Fifth Lines from Bottom,

for "of law, *as they ought not to decide the law*, and the question remains entire upon the record; the Judge" *etc.*,

read "of law; and, *as they ought not to decide the law;* and the question remains entire upon the record, the Judge" *etc.*

Page 27—First and Second Lines from Top,

for "in all criminal cases, the jury shall be Judges of the law and the fact"

read "In the trial of all criminal cases the jury shall be the judges of law as well as fact"